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THE LAW OF THE CATHOLIC CHURCH *

THE law of the Catholic Church is called the Canon Law, in contradistinction to the Civil Law. The word "canon" is from the Greek word meaning "rule" or "standard". The Canon Law began shortly after Christ, the God-man, said to Simon, the fisherman of Galilee: "Thou art Peter and upon this rock I will build my Church and the gates of hell shall not prevail against it; and I will give thee the keys of the Kingdom of Heaven; and whatsoever thou shalt bind on earth shall be bound in heaven, and whatsoever thou shalt loose on earth shall be loosed in heaven."[1] Ever since that time the Successor of Peter has enjoyed full legislative, executive and judicial jurisdiction in the Church of God. The Bishops of the world, as the Successors of the Apostles, when gathered in a general council, called or recognized by the Pope, likewise enjoy universal legislative power, for Christ also gave to the Twelve the power of binding and loosing.[2]

Throughout the nineteen centuries of the existence of the Catholic Church, Popes and Councils have made laws to meet varying situations and to combat rising errors. Gradually a

* Address by the Reverend James P. Kelly, J.C.D., President, The Canon Law Society of America, and Judge in the Curia of the Archdiocese of New York, over the CBS "Church of the Air" Catholic Program on Sunday, June 6th, 1943, 1:00 to 1:30 P. M., E. W. T.

[1] Matthew xvi, 18-19.

[2] Matthew, xviii, 18.

jurisprudence and polity developed based upon the divine positive and natural laws. The law of the Church was for several centuries the law of the land in many sections of Christendom, and even today traces of its influence may be found in some modern codices. Prior to 1918 the law of the Church was scattered through several collections of Papal decrees and decisions and the pronouncements of various General Councils. In 1904 Pope Pius X appointed a Commission of Cardinals and jurists to codify the law of the Latin Church under the direction of that renowned jurist and statesman, the late Peter Cardinal Gasparri. After more than twelve years of untiring labor and relentless research, and after having consulted all the Bishops of the world, on June 28, 1917, in the Throne Room of the Vatican Palace, in the presence of the Cardinals and Prelates of the Papal Court, Cardinal Gasparri formally presented to the successor of Pius X the finished product—THE CODE OF CANON LAW. Pope Benedict XV, the successor of Pius, solemnly approved and ratified this document as the universal law for the Latin Church, to become effective on Pentecost Sunday, 1918. The law of the Latin Church, therefore, is now contained in a single volume known as THE CODE OF CANON LAW, which will celebrate its twenty-fifth anniversary on next Sunday. The law for the Oriental Rites is now in the process of being codified.

THE CODE OF CANON LAW is not a volume of arbitrary regulations and restrictions to make life difficult for Catholics, as many believe; it is not a collection of "thou shalt nots" and anathemas, as some might imagine; it is not a stilted static compilation of ancient decrees and decisions. It is rather a modern legal compendium containing an orderly series of concise and exactly-worded statements of juridical principles and positive enactments covering every aspect of the Church's myriad activities. It contains 2,414 canons, or laws, and is divided into five books. The first book states the general norms and juridical principles according to which the positive legislation is to be interpreted. The second book treats of persons and juridical personalities. The third book is about

things. The fourth book is concerned with the Judiciary Department of the Church and lays down the rules for the conduct of ecclesiastical trials. The fifth book is the penal section treating of crimes and punishments, such as excommunication, suspension, and interdict. There is, moreover, one unwritten law, not contained in the Code, which the Church has borrowed from the ancient Romans and adapted to express the purpose of all of her legislation. This unwritten law is contained in axiom: "The salvation of souls is the Supreme Law of the Church."

These first twenty-five years of the existence of THE CODE OF CANON LAW have been turbulent days. Philosophies and ideologies have flourished which have given rise to juridical concepts which would destroy all law and order, all justice and peace. The philosophies of agnosticism, naturalism, and materialism, which have been so prevalent in the past twenty-five years, have given birth to two opposing schools of juridical thought, each equally erroneous: the school of juridical positivism, and the school of juridical liberalism. There is one basic principle which both of these schools have in common, and that is the denial of God.

Having removed the authority of God as the sanction for law, the positivists deify the State and demand allegiance and obedience to the laws of the State no matter how contrary they may be to natural justice and equity or to the positive law of God. In this godless concept, the State is made to serve the interests of a race, a class, or a group who have seized power and are using that power for their own ends. Be they Nazis, Fascists, or Communists, these totalitarians hold that man exists only for the State, receives all his rights from the State and can do only what the State permits him to do. So, too, in this concept the Church has no juridical existence in its own right but is permitted to exist only by sufferance of the State, and all her ministerial, charitable and educational functions are to be regulated by the State.

On the other hand, there are the juridical liberalists who, denying the existence and the authority of God, deny also the

auhority of the Church. They admit the authority of the State, but only as a punitive agency. These deify the individual man and leave it to the individual to determine whom he will obey and when he will observe a law. If carried to its logical conclusion such subjectivism and individualism would lead to anarchy; and this juristic concept is particularly dangerous in our own land because it usually masquerades in the costume of democracy. The adherents of this school recognize no sanction for any law other than the penalty imposed for its violation; so that if one is willing to pay this penalty if caught, or feels reasonably certain that he will avoid detection, there is no reason for him to observe the law, especially if it is not in his interest to do so. Some of these extreme liberalists, with their usual carelessness for truth and with their facility for false labeling, have dared to accuse the Catholic Church of Fascism or Fascist tendencies because the Church teaches respect for all legitimately constituted authority and obedience to the law of such authority as the expression of the Will of God.

It is the teaching of the Catholic Church that all authority is from God. It is the teaching of the Catholic Church that in God's plan for the orderly government of the world He has delegated His authority to two perfect sovereign societies, each independently and exclusively competent to regulate the affairs of men within its own sphere. These two sovereign powers are the Church and the State. The Church was established by God for the spiritual welfare of man in this world and to lead him to an eternity of happiness in Heaven. The State was constituted as the supreme authority for the temporal welfare of man in this world. Both of these powers act with the authority of God but both must keep in mind, and legislate for, the good of the individual subject and the common good of the community. Whenever the competence of the Church and the State clash, it is the duty of both to work out an adjustment of the difficulty by arbitration, mindful always of the purpose for which God has given to each His authority. It follows from this teaching that the subjects of both the

Church and the State owe to each of these sovereign powers their filial allegiance and obedience, so that a deliberate violation of the law of either the Church or the State is a sin of disobedience against the authority established by God. It is only when it is evident that the law of the State has transgressed the Natural or Positive law of God that one is justified in refusing to obey, for as Saint Peter said in these circumstances, " We must obey God rather than men ". [3]

How sound are these principles when compared with the modern juridical concepts of Positivism and Liberalism! How different from the totalitarian concept of the all-powerful State or the ultraliberalistic concept of the all powerful individual! How much more secure are these principles as the foundations of government than the juridical offspring of the godless philosophies of agnosticism and materialism! In our beloved country if lawlessness and disrespect for authority are widespread, if delinquency—particularly among the youth—is increasing by leaps and bounds, if black markets are flourishing, and prisons are overcrowded is it not because many of our fellow citizens have lost all notion of God as the Ruler of the World, acting and governing through His legitimately deputed representatives? Is it not because some of our secular jurists, infected with the deadly virus of godlessness, have abandoned the Law of God as the foundation of jurisprudence and sought to govern by statutes dictated by popular sentiment or utilitarianism or expediency. How often are laws advocated by statesmen or passed by legislators or interpreted by judges, which are openly contrary to the Positive or Natural Law of God. If America would avoid the tyranny of totalitarianism and the anarchy of liberalism, we must return to the Christian concept of God as the source and sanction for all law; we must return to the Christian concept of the Authority of God as the foundation for all government. And we must pay more than lip service to Him, by recognizing the Divine Positive and Natural Law as the basis of all sound jurisprudence.

[3] Acts, v, 29.

Giving his program for the rehabilitation of this sick and confused world, the Vicar of the Divine Physician diagnosed modern ills last Christmas and on this point said: "The juridic sense of today is often altered and overturned by the profession and the practice of a positivism and a utilitarianism which are subjected and bound to the service of determined groups, classes and movements." He prescribed the specific for this disease when he said: "The cure for this situation is the re-awakening of a consciousness of a juridical order resting upon the supreme dominion of God"... "and the re-establishment of clear juridical norms which may not be overturned by unwarranted appeals to a supposed popular sentiment or by merely utilitarian considerations".

On this twenty-fifth anniversary of the enactment of THE CODE OF CANON LAW, The Canon Law Society of America calls upon its fellow citizens to awaken to the necessity of returning to a juridical order founded on the supreme dominion of God; to awaken to the realization that the terrifying wave of lawlessness and delinquency sweeping our land is fundamentally due to our abandonment of the authority of God as the source and sanction of all law; and to statesmen and jurists, lawyers and judges seeking a clear statement of sound juristic norms and principles we offer a masterpiece of brilliant juridical genius—a result of nineteen centuries of experience in world-wide government—a modern legal document in every way comparable to all the classics of jurisprudence from Justinian to Blackstone—THE CODE OF CANON LAW.

* * *

May the Holy Spirit of God on Pentecost of 1943 breathe again into our hearts the spirit of respect for authority and obedience to law; and may He illumine the minds of our statesmen and jurists that they may see clearly the dangers of godlessness; and may the Immaculate Mother of God, to whom our beloved United States of America has been dedicated, obtain for us by her prayers a return to that sound juridical order founded on the dominion of God which is so necessary for our temporal and eternal welfare. Amen.

A SIGN TO BE CONTRADICTED

AS the world hopefully rises from the nadir of the present quarter-century peace-war cycle, its leaders are most probably as insensitive to a current providential sign as were their prototypes to a signal flashed to them in the depths of the darkness of the first World War. That signal sparkled through the blackness of the final thrust on Paris before the gloom commenced lifting in the radiance that was Chateau Thierry. It had the qualities of an esoteric portent, unintelligible to the benumbed and the benighted. It was in a Code, ignored, perhaps despised, by the signal corps of the princes of the world. They should, indeed, have been put on notice, for it was candidly called a Code. But diplomats that they were, they fell prey to such utter frankness. Insomuch as they were even aware of it, they were psychologically impotent to credit it with candor. Its being called a Code was impatiently dismissed as a kind of colossal pretension. If it were in truth a Code, it could not be so blatantly advertised as such.

An inspection of its pages afforded confirmation of the contempt visited upon it; or so it superficially seemed. Here was a pretentious catalogue of canons devised for some Gulliver's land. Some Boccaccio or Rabelais or Twain was recording his perennial ironic thrust at the mystic's fable-land. A sympathetic nerve must have responded somewhere to the recognition of the subtlety underlying the apparently unsophisticated work. But the cataclysmic emergency of those days allowed for the barest counterfeit of a smile. There might come a time when the work could be thoroughly enjoyed. It was not then the time.

Had it been accepted as a Code to communicate intelligence, it might easily have been recognized as a most fortunately apprehended document. Even a misconstruction of the appar-

ent purpose of its contents should not have blinded a vigilant mind to its ulterior significance. It might superficially appear to be an old-wife's set of rules for some land of Oz; but that was to be anticipated in a communicative Code. The interpretation of the obvious might have remained the same; it might have been accepted as a bit of ironic stricture on unrealistic unworldliness. But deciphering would have revealed a latent message far different from the patent one which the sacrilegious eye too readily seized upon. How profound in its consequences was that impulsive impatience! What aimless marksmanship followed that original deflection from the mark! What idiotic strategy was conceived in that misconception!

Since it was ignored as a Code, its message also lay impenetrably veiled. The veil remains today as opaque as it ever was. The evangelist that the Code was planned to be, it still can be, if only subjected to the ingenuity of deciphering. This will probably not be done. Today's leaders will no more acknowledge its occult mission than their predecessors of a generation past. Assurance in this traditional attitude will seem more warranted in that the Code has shown its importance as nugatory in world affairs. What matters it that never in twenty-five years has the world sought the message that it brought!

It has probably not been regarded as a Code by any one; that is, not as bearing a latent message to the world. Even they who are best acquainted with its immediate design may have failed to grasp its occult significance. A calendar records only days and months for him who treasures it only as a calendar. For him that is, indeed, sufficient. Because the calendar is highly responsive to his wants, he does not suspect that it may be capable of serving some more noble end. Indeed, like all silent and efficient servants, it may have breeded a contempt for its importance. Even its beneficiaries may hold it capable, as Cinderella, of nothing but a menial's post. So the immediate beneficiaries of THE CODE OF CANON LAW may recognize its immediate end. They may deplore the worldling's derision of its disciplinary importance; they may grieve at the

mockery, implicit in that derision, of the authority that sponsored it and of the society subject to its laws. But they would join the deriders, some reluctantly, some spontaneously, in denying to it strategic importance in world affairs. They, too, are blind to the current providential sign.

But it certainly can not be without providential design that the twenty-fifth anniversary of the enactment of the Code occurs at a time which is the almost exact counterpart of the period in which it was born. Our nation at war for somewhat more than a year—the nadir of our fortunes just reached and passed—eventual victory reasonably assured. Can it be that a second grace is being accorded a world which so peevishly refused the first! Indeed, the twenty-fifth anniversary, in naked significance, should be no more portentous than the first. But custom and tradition have canonized twenty-fifth anniversaries and imparted to them a mystic prestige, giving them significant rank as symbols of the principal event. Coincidence of this time symbol with similar time events should point to the relevancy to the present of the Code which the anniversary recalls so vividly to mind.

In learning the secret message of the Code, the analyst would find antecedent to it a state of legal turmoil that made imperative a clarification and codification of the law. He would recognize a confusion analogous to that existing in the relations of international states. He would sense an antecedent fathomless apathy, the parallel of the hopelessness in the current international scene. He would be confronted by an incomprehensible, seemingly unmotivated opposition to codification, the counterpart of the indocility evidenced at large in the memoranda of the legations. To this point, the melodrama in each instance follows a collateral development. Thus far, in both spheres, the advocates of confusion and separation prevailed. Thus far and further they still command on the international front. But they were scattered in the epoch-making incident of the Code. And in the method of that dispersion seems to lie the charter of international harmony and peace.

A strong man arose who did not laugh at discord but, pitying it, devised strong methods of control. Braving the cries of opposition, ignoring prophecies of defeat, he established a seminar of uncorrupted idealists who, indeed, had much to learn, but who learned by doing. Their very innocence of knowledge made them innocent also of its pride. Indeed, they were not ignorant; but they were far from being the experts their work would make them, and most of them were but amateurs in the eyes of those who wished them ill. They combed through the tangled skein and wove a modest tapestry, a masterpiece of simplicity, the rallying standard of disciplinary uniformity in the Church.

The strong man was Pope Pius X, to whom belongs chief credit for the accomplishment. Sharing honors with him is the whole body of idealists but preeminently Gasparri, De Lai, and Pacelli, all made Cardinals for their loyalty, and one made Pope.

On that day, May 27, 1917, when Pope Benedict XV promulgated the Code in the Constitution, *"Providentissima mater Ecclesia"*, none felt greater confidence than these collaborators in its adequacy to the end which had been set before them. And one year later, May 19, 1918, when the Code became the universal law, they commenced impatiently, as a tangible reward of their devotion, the counting of the blessings of unity of which it has since been the prolific source.

Reading the portent aright, should one not say that the generation of warmongers must be scrapped if a charter of international amity is to emerge from the present struggle! A seminar of reactionaries would never have drafted the simple, straightforward legislation of THE CODE OF CANON LAW. So the old-line politicians will never offer the world a simple, straightforward set of norms for international good will. A motley mess of compromises, the counterpart of Versailles, will be the highest reward of their ablest efforts. They are possessed by the demons of obscurantism, reaction, and despair, and their work can but feebly conceal the mark of their possession. Let single-minded idealists be found, men ably and

seriously intent upon peace, even at the cost of economic sacrifice. Test their independence of the sordid motives that seem essential qualifications of efficient diplomacy, even of the sordid patriotism that was Decatur's boast. Then bind the nations to the Code they will devise.

"Impossible!", I have no doubt! There are probably no idealists to make a world code like the idealists who made THE CODE OF CANON LAW. There are probably none like them to feel the presence of God in their conferences or to recognize their ultimate responsibility to Him. Worse, there is probably no strong, independent, pure-minded internationalist except our Holy Father, who could dominate and control the project. But the message is in THE CODE OF CANON LAW. Statesmen, find your untrammeled idealists and give them a pure-minded coordinator, if you expect to end the recurrent cycle of peace and war.

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THE EFFECT AND OBLIGATION OF INVALIDATING LAWS

AMONG the several items in this article the principal point to be discussed is the time when an invalidating law takes effect. It will be remembered that an invalidating law may be a penalty, although usually it is not; it will also be remembered that the establishment of an invalidating law depends on the will of the legislator. Therefore, the time when an invalidating law will take effect will depend on the character of such a law and, more fundamentally, on the time when the legislator desires such an effect to occur.

Closely allied to this question is the determination of the forum, or even the determination whether in both fora an invalidating law will produce its effect. Much of the discussion of the actual obligation of an invalidating law in the internal forum is superfluous in Canon Law. Such a question is considered together with all other ecclesiastical laws in the usual treatise on the power of the Church to enact laws.[1] Hence, there will be no need to dwell on the fact that an invalidating law can bind in the internal forum. This is assumed as proven and accepted.

The question when an invalidating law takes effect is important. It is possible that the law may stipulate immediate effect in the internal forum so that the act is immediately invalid. It is also possible, especially if one follows the usual division of invalidating laws, for such a law to require declaration of invalidity before the act need to be considered invalid. It is further possible that if the invalidating law is penal, no possible effect at all is produced before the crime which invokes the invalidating law is proven and sentence upon it passed.

[1] Cf. e.g., Michiels, *Normae Generales* (Lublin, 1929), I, 125; Cicognani, *Commentarium ad librum I Codicis* (Romae, 1925), pp. 67-68; Maroto, *Institutiones Iuris Canonici*, pp. 216-220, 240.

If everyone admitted that an invalidating law was a law which immediately produced its effect, the discussion of the time when such a law would produce its effect would be greatly simplified. This would, of course, entail reducing a number of alleged invalidating laws to enactments which rescind acts rather than invalidate them. Such a simplification is not commonly admitted either by modern canonists or by earlier authors.[2] Hence it is necessary to study the effect of an invalidating law both in its simplest terms and in the division offered usually by canonists.

Reduced to its simplest terms, an invalidating law will immediately produce its effect. Such a law will indicate that the act contrary to it is invalid or that the person disqualified by the law is unable to act legally. The application of such an invalidating law requires no decision or even declaration of a judge to produce invalidation. This was the force of the laws of Theodosius II and Justinian. Their laws specifically stated that no special clause was necessary for invalidation.[3] The laws were also clear in not requiring a judicial declaration or sentence before the act would be considered invalid. Both Theodosius II and Justinian order that the act contrary to law be accounted worthless.[4] No provision is made for judicial review of the prohibited act. Nor would it be legitimate to read this provision into the laws of Theodosius II and Justinian. Their laws are so definite in establishing contrary acts as invalid that the ministry of the court would be superfluous in applying the laws. A disputed fact might well be reviewed to learn whether it is actually contrary to law, but if this act were already established there would be no need in Roman Law to declare this fact as established or to judge it as actually contemplated by the law. Suarez,[5] however,

[2] *E.g.*, Michiels, *o.c.*, pp. 268-270; Reiffenstuel, *Ius Canonicum Universum*, (Parisiis, 1864), lib. I, tit. II, § XI, nn. 240-241, 243.

[3] "*Licet legislator fieri prohibuisset tantum*", etc.; "*tantum prohibuisse sufficiat*".

[4] "*. . . illud quoque cassum atque inutile esse praecipimus*". The same text is used by Justinian and Theodosius II.

[5] *Tractatus de Legibus ac Deo Legislatore* (Neapoli, 1872), lib. V, cap. XXVIII, n. 6.

maintained that a judicial review of the act would be required. He based his contention on the plea that a criminal act would be involved.

An act contrary to an invalidating law is invalid in both the internal and the external forum. No excuse of ignorance or good faith will impede the effect of the law,[6] unless such excuse is already admitted by the law itself. Such immediate application of an invalidating law will be found frequently where no penalty is involved. A bishop, for instance, who has accepted a resignation from office cannot confer this office on his own or the resigning official's close relatives.[7] The application of this law does not involve a penalty for the relatives of the bishop or of the official who has resigned. Consequently, in order that this law may be operative, it is not even necessary for a declaration of invalidity to be made.

If, however, the non-penal invalidating law should demand a declaration of invalidity, its effect would not be produced before the declaration had been made. Such a non-penal invalidating law would be exceptional. But, it could occur since the time of effect depends on the will of the legislator. However, such a law should be carefully distinguished from a law which assumes a valid rescindible act. Van Hove speaks of a "*nullitas latae sententiae*"[8] where the invalidity of an act is indeed determined by law but this effect depends on a judge's declaration.

A penal invalidating law will naturally follow the jurisprudence of penalties. Hence, if the law demands a judge's sentence before the penalty is inflicted the effect of invalidation will be suspended. If, however, the penalty is inflicted by the law itself, the effect is produced immediately in both fora.[9] Nevertheless, until a declaratory sentence is passed this penalty need not be observed if it cannot be observed without be-

[6] Cf. c. 16, § 1.

[7] Cf. c. 157.

[8] *De Legibus Ecclesiasticis* (Romae, 1930), p. 165.

[9] Cf. c. 2232, § 1.

trayal of oneself and, in the external forum, its observance cannot be demanded provided the crime is not notorious.

The foregoing explanation is occupied principally with prohibitory laws. However, laws which demand definite formalities or solemnities can also invalidate contrary acts. Such laws frequently demand minute observance. While a distinction between substantial and accidental form must be admitted, the invalidity of the act once it is demonstrated by the neglect of the proper form will be immediately effective in both fora. The question here is not so much to determine in which forum or when the act is invalid but to determine whether the substantial or the accidental form has been neglected. Should doubt arise which form has been neglected, the act, before its adjudication, must be considered valid. Invalidation of an act is never presumed.

Canonists [10] who divide invalidating laws into laws which invalidate an act immediately or immediately disqualify a person from acting and laws which require a judge's decision for invalidity distinguish likewise between immediate invalidation and subsequent judicial invalidation. It must not be thought that in the latter laws no invalidation is contained in the text of the law. It is precisely this existence of an invalidating clause which does set these laws off from laws which merely permit rescissory actions.[11] This difference is, of course, admitted, but the resemblance is so close in practice that such division should be criticized.[12] Since, however, this division is taught, an examination of its statement on the time when an invalidating law takes effect must be made.

All canonists who teach this division in order to explain the operation of an invalidating law must distinguish several stages. Michiels does this openly.[13] In his consideration of a law which requires a judge's decision for the invalidity of an

[10] E.g., Michiels, *o. c.*, I, 269.

[11] Cf. Michiels, *o. c.*, I, 269, footnote 2.

[12] The difference criticized in the text was taught by older canonists, e. g., Reiffenstuel, *l. c.*

[13] *O. c.*, I, 269.

act, Michiels says the first stage of the law (*in actu primo*) establishes invalidity; the second stage of the law (*in actu secundo*) is the judicial application of this invalidity. In other words, the law demands that the judge annul the act. It leaves the judge no option. The obvious conclusion from this is that the act, although contrary to an invalidating law, is considered valid in both fora until it is adjudged invalid. Such operation of an invalidating law is evident in penal invalidations, but it is not so easily seen in non-penal invalidations. It is true that whenever a judge applies a penalty by condemnatory sentence the effect of the law which he applies is suspended until the sentence is pronounced. There is no reason why a penal invalidating law should be otherwise considered. But, what if the invalidating law is not penal but introduced for the welfare of the society or its members? To say then that the act contrary to law is considered valid until a judge decides otherwise means that the beneficiary of the act contrary to law can meanwhile enjoy the fruits of his act. Of course, the judge's decision will be retroactive, but by that time the fruits of the act may have disappeared or been consumed. To assess for damages will not always meet the situation. Besides, if the act is in both fora to be considered valid until contrary sentence is pronounced, it gives the beneficiary some small title to benefit in justice. The only way to meet this objection would be to say that the act is provisionally valid and therefore the benefit is provisional. Such answer, however, will not restore fruits of the act already consumed or which have already disappeared. These fruits were not properly the effect of the law.

Because of this difficulty, it is asserted here [14] that non-penal laws which order a judge to invalidate an act should rather be considered rescissory laws. Michiels himself sees the difficulty and admits that such latter laws are to be compared to invalidating laws.[15] But Michiels reverses the com-

[14] It will be remembered that this is a criticism of the division of invalidating laws as offered by Michiels and Reiffenstuel.

[15] *O. c.*, I, 270, footnote.

parison. If the effect of the law be considered, such non-penal invalidating laws are rather like rescissory laws than the latter are like invalidating laws. This is stated because the first and fundamental effect of an invalidating law is to invalidate; the first and fundamental effect of a rescissory law is to rescind. The latter effect is clearly and demonstrably maintained in law and can be sought only in regard to acts which are beyond question valid. The former effect is, however, only deductively presented. If an act contrary to an invalidating law be actually valid, this effect cannot be its first and fundamental effect. Therefore, it is better to say that non-penal invalidating laws requiring a judge's decision for invalidity closely resemble and can be compared to rescissory laws rather than to make the reverse comparison.

Maroto [16] agrees with Michiels' comparison. He states briefly that an invalidating law which depends for its operation on the judge's decision (*"ferendae sententiae"*) and a rescissory law both operate only after the judge has invalidated or rescinded the act. Meanwhile, Maroto says, the acts are valid and produce their effect.

Van Hove [17] holds a similar opinion of such invalidating laws as were discussed. However, he is careful to note that such a sentence is not retroactive. If this is true there is scarcely any difference at all between an invalidating law and a rescissory law. Van Hove proceeds to say that the nullity of an act is altogether different than its rescindibility. This is, of course, admitted by all, but if the condemnatory sentence required by an invalidating law is not retroactive, it will produce even less effect than a rescissory law. An anomalous situation is thus created. A rescissory law is retroactive in regard to a valid act performed within the law; an invalidating law preserves the fruits of an act said to be valid, but performed contrary to the law. The same anomalous situation is not created when only future penal invalidations, or future penal disqualifications constitute the judge's sentence. Thus, in canon 2346, a

[16] *O. c.*, p. 239; *lex irritans ferendae sententiae et pariter illa quae actus rescindibiles, etc.*

[17] *O. c.*, p. 165.

cleric who converts ecclesiastical property to his own use is to be punished with a disqualification for any benefice. This penalty is not retroactive, although the cleric is also to be deprived by another penalty of the benefice he may actually possess.[18]

The opinion of Michiels and Maroto is not new. Reiffenstuel, for instance, also taught that some invalidating laws did not produce their effect until a judge's decision was pronounced. In the meantime the act was valid.[19] Reiffenstuel based his doctrine on a decretal of Pope Innocent III.[20] This decretal closes with the statement that "many things are patiently tolerated which ought not to be so regarded in justice if the matter is brought to court." [21] It is difficult to see that this decretal of Pope Innocent III supports the doctrine of Reiffenstuel. The case discussed in the decretal was a flagrant violation of an invalidating law regarding rescripts. The Pontiff nowhere in the decretal says the act contrary to the invalidating law is valid. On the contrary, he specifically states that the rescript is invalid.[22] The real force of the decretal is found in the public denunciation of the invalid act. Because the Pontiff says that "many things are patiently tolerated" it is hardly logical to say that the tolerated act is therefore valid. The tolerance of an act does not necessarily presuppose validity of the act. It is true that neither does tolerance of an act indicate that the act is invalid. All that can be said is that, if an act is tolerated, the act itself had been unlawful. In his decretal, Pope Innocent III mentions that the act he condemned was not only contrary to his own law but also contrary to the law of the Lateran Council. He speaks also of the culprit's intrusion into office. These are

[18] *Si quis bona ecclesiastica cuiuslibet generis . . . . ad alia quaelibet inhabilis efficiatur.*

[19] *O. c.*, lib. I, tit. II, § XI, n. 245: *certum insuper est eum valiturum donec per sententiam rescindatur.*

[20] C. 18, X, *de praebendis et dignitatibus*, III, 5.

[21] "*. . . multa per patientiam tolerentur, quae, si deducta fuerint in judicium, exigente justitia non debeant tolerari.*"

[22] "*Quod litterae commissoriae tanquam per subreptionem obtentae carerent pondere firmitatis.*"

public matters, and the Pontiff orders that, if the facts are found to be true, further tolerance cannot be shown.

Reiffenstuel also claims as support for his doctrine various examples of contracts, transactions, renunciations, etc., which are entered into through grave and unjust fear. These examples are excellent to demonstrate the possibility of rescinding valid but unlawful acts. But they do not necessarily show that an act contrary to an invalidating law is valid until a judge pronounces sentence. The examples which Reiffenstuel adduces would certainly today be considered as valid rescindible acts but would not be classified as acts contrary to an invalidating law.[23]

Reiffenstuel further says that if an act is not completely (*plenissime*) invalidated by law and no one opposes such an act, possession resulting from this act can be retained in conscience.[24] Such an act would be valid in natural law. Its only defect would be its contrariety to positive law. This is, of course, assuming that positive law did not completely invalidate the law. The example Reiffenstuel uses is alienation. He claims that if alienation is otherwise licit but was made without observing the form prescribed by law, such alienation is not invalid in the internal forum. Consequently, any fruit or price of alienation can be retained until someone would oppose this retention or the case would be brought to court. As also maintaining this opinion, Reiffenstuel cites Panormitanus and Joannes Andreas.

This example adduced by Reiffenstuel is of little importance today. Canon 1530, § 1, 3° specifically states that alienation without proper permission is invalid.[25] No provision is made in this canon for judicial review of alienation before it is considered an invalid act.

[23] Cf. c. 103, § 2: *Actus positi ex metu gravi et injuste incusso vel ex dolo valent, nisi aliud iure caveatur; sed possunt ad normam can. 1684-1689 per iudicis sententiam rescindi, sive ad petitionem partis laesae sive ex officio.*

[24] *O. c.*, n. 255.

[25] *Licentia legitimi superioris sine qua alienatio invalida est.* Cf. Cleary, *Canonical Limitations on the Alienation of Church Property* (Washington, 1936), p. 65.

Reiffenstuel also cites a law of the IV Lateran Council [26] to show that if an act is not completely invalidated by the law it can be considered valid until a judge pronounces sentence. This law, however, can scarcely be offered as support for Reiffenstuel's opinion, for after determining the formalities required in an election the law specifically states that any other form of election with the exception of "quasi-inspiration" is invalid.[27]

Reiffenstuel offers two more arguments to support his opinion. One of these arguments is from reason; the other is from custom.[28]

In discussing his argument from reason, Reiffenstuel states in effect that the natural obligation of an act is inseparable from the act itself. Therefore, if the law itself does not completely invalidate an act, this act must be considered valid until a judge decides otherwise. This argument can be readily admitted if an invalidating law is not by its text immediately operative. There is nothing sensational in this argument. Given the premises upon which the argument rests, the conclusion is evident. But, the difficulty would be to determine that the invalidating law is not immediately operative. Since the whole obligation of the law depends on the will of the legislator, he can suspend the effect of the law until a court intervenes. This, however, must be demonstrated and not presumed in invalidating laws because the first and fundamental effect of such a law is to invalidate an act. The manner of the invalidation may not be fundamental, but it must never be presumed that a non-penal law is inoperative until a judge pronounces sentence. It is possible, of course, and it is readily admitted that an invalidating law may require the intervention of the court, but this necessity must be demonstrated.

In his argument from custom, Reiffenstuel correctly estimates the force of custom. He says that custom has modified the application of an invalidating law which does not imme-

[26] C. 42, X, *de electione et electi potestate*, I, 6.

[27] "*Aliter electio facta non valeat nisi forte communiter esset ab omnibus, quasi per inspirationem absque vitio celebrata.*"

[28] *O. c.*, nn. 257-259.

diately and of itself operate. That this modification has been introduced cannot be denied. However, custom is superfluous. If the law, as Reiffenstuel says, is not immediately operative, it is not necessary that custom intervene in order that the act be valid until it is adjudicated. If, however, Reiffenstuel means that custom has introduced an interpretation of an invalidating law so that its effect is not produced in the internal forum before a judge has pronounced sentence, he would be assigning a destructive force to custom which should be rejected. Such a custom would be an abuse scarcely to be tolerated by the legislator. One must remember, however, that Reiffenstuel is not speaking of custom which would interpret a law that immediately invalidates an act; he is speaking of a law which requires in the external forum a judge's decision before the act is invalid. He is reviewing the effects of this act in the internal forum before the act is adjudicated. Here, he says, custom has modified whatever original intention the legislator might have had.

The examples which Reiffenstuel uses to support his opinion are not all appropriate. He says no one should be forced to surrender what he has received if the only defect in the transaction is a non-observance of the solemnities of acts. Especially is this so since the matter at hand is still disputed among canonists. Is this example illustrative of custom? Apparently not, for if the latter element be rightly essayed the application of the law is doubtful and naturally not by reason of custom but by the rule of equity the validity of the transaction must be maintained. If any serious dispute exists among canonists, the law in question is of doubtful application. No one, then, could assert the invalidity of an act before it is adjudicated.

The second example used by Reiffenstuel is really a comparison between an invalidating law and a penal law. Reiffenstuel says that a penalty "*latae sententiae*" requires a declaratory sentence (*externa executio*) before it obliges in conscience. Therefore, the effect of an invalidating law should be suspended until the ministry of the judge is obtained. Whatever may be said of this comparison as far as the penal

law of Reiffenstuel's time is concerned, the present law [29] says a penalty "*latae sententiae*" binds in both fora. The law does say that no one can usually demand observance of this penalty in the external forum before a declaratory sentence, but the first effect of the law is to bind in both fora. Therefore, even before a declaratory sentence is passed the penalty should really be observed.

The discussion of Reiffenstuel's opinion has been rather long and involved, but it is necessary even at the risk of considerable length to appraise his opinion. Reiffenstuel enjoys unparallelled respect and is frequently cited as an approved author both in later canonical commentaries and in the opinions of the Church's courts. It is always with regret that an opinion of Reiffenstuel is discarded. If such rejection is asserted here it is because of the confusion which would arise in using his opinion to describe the operation of an invalidating law.

Criticism of Reiffenstuel's opinion of the obligation to observe the effect of an invalidating law in the internal forum does not extend to his explanation of the effect of such a law which completely and of itself operates. Reiffenstuel states explicitly that if a law completely and of itself invalidating is involved there is no doubt that an act contrary to this law is invalid in both the internal and the external forum.[30] In this, Reiffenstuel concurs in the common opinion of canonists.

The argument of the preceding pages has necessarily been prolix. The discussion of various opinions has been long and perhaps tedious. Hence, a few words of summary combining the various divisions of invalidating laws will not be amiss.

First, an invalidating law which does not require the intervention of a court either for declaration or for condemnation of the act in question produces its effect immediately in both fora; secondly, an invalidating law which requires such intervention of the court does not produce its effect in either forum until a sentence is pronounced. The consequence of this second statement is that an act contrary to an invalidating law is

[29] Cf. c. 2232, § 1.

[30] *O. c.*, n. 251, 253.

considered valid until it is adjudged invalid. The effect of this judgment should be retroactive.

After the discussion of the fora in which an invalidating law can produce its effect, the question arises whether there is an obligation to avoid the infraction of such a law. It is impossible to say that such an obligation always exists. Since an invalidating law can be enacted for various reasons, it might seem that the legislator always insists that his law be obeyed. In so far as this insistence is stressed there is always an obligation to obey an invalidating law. But if, on the other hand, the matter be viewed with an eye to an obligation in conscience to omit an act controlled by an invalidating law, it cannot be established that such an obligation always exists. There is no contradiction between these two suppositions. For instance, if the legislator forbids an act and invalidates it, if it is really performed, an obligation exists in conscience to omit the prohibited act. If, however, a certain and definite formality is established by law, there is no obligation in conscience to omit an act contrary to this law. It is, of course, to be expected that this act is invalid since it is not in conformity with the prescriptions of law. It will, then, be necessary to divide invalidating laws and consider their obligation in conscience separately. But before this consideration is attempted it is also necessary to emphasize that it is not the obligation to accept the effect of an invalidating law which is the subject of this discussion. Such obligation is inherent in the law itself. An obligation of this kind always exists. The obligation to be considered now is the obligation to omit an act which would produce an invalidating effect.

As far as the obligation to omit an act is concerned, a prohibitory invalidating law is no different from a prohibitory law which does not contain an invalidating clause. The source of this prohibition is immaterial. It is of no real importance whether the prohibition be merely the will of the legislator or be founded on right order and decency. The various reasons which might influence the legislator to prohibit an act are useful to know for the interpretation of the law and to urge its

observance, but they have no real effect on the prohibition decreed by law. Hence, it is not necessary that the prohibited act be malicious in itself. It is, however, clear that the prohibited act acquires some malice from its very prohibition.

A law which merely invalidates an act or disqualifies a person acting does not of itself oblige in conscience to omit an act. Assuming, therefore, that a person is prepared to accept invalidation as an effect of the law, he is not further forbidden to perform such an act. A law, for instance, which demands a definite form [31] means that legal recognition will be given to an act thus performed. It means, too, that legal recognition will be denied, if this form is neglected.

While the act is invalid, due to neglect of formalities, Canon Law wisely provides for the fulfilling of a testator's will. Canon 1513, § 2 [32] demands that the solemnities of the civil law be observed, if possible, whenever the good of the Church is concerned, but the law also states that if these solemnities were omitted the heirs should be advised to fulfill the testator's will.[33] The latter obligation is primarily laid upon the heirs to fulfill the bequests made by the testator. As such, the obligation is not properly within the scope of this work.[34] The obligation, however, laid upon the testator himself in Canon Law is a serious obligation to obey the prescriptions of civil law. There is no doubt that this is more than a suggestion since the Church urges that the bequests of an invalid will be none the less executed.[35]

Van Hove [36] warns that if an act is performed contrary to an invalidating law it is completely invalid both in regard to

[31] Cf. civil law on testaments accepted by Canon Law.

[32] *In ultimis voluntatibus in bonum Ecclesiae serventur, si fieri possit, solemnitates iuris civilis.*

[33] *. . . . hae si omissae fuerint, heredes moneantur ut testatoris voluntatem adimpleant.*

[34] This obligation is thoroughly discussed by Hannan, *The Canon Law of Wills* (Washington, 1934), pp. 283-301. Cf. also Ayrinhac, *Administrative Legislation in the New Code of Canon Law* (New York, 1930), pp. 414-416; Pistocchi, *"De Bonis Ecclesiae Temporalibus"* (Taurini, 1932), pp. 251-252.

[35] Cf. Hannan, *o. c.*, p. 283; Pistocchi, *o. c.*, p. 250.

[36] *O. c.*, p. 171.

the persons directly interested in the transaction and in regard to others who may possess some interest. It follows, then, that there is some obligation to omit an invalid act whenever the rights of others are jeopardized by such an act.

An invalidating law may also be a penal law. Hence, the theory and application of penalties must also be considered whenever an invalidating law is penal. But, before any remark is made on the obligation to omit an act contrary to such a law, it must always be remembered that the penal element of the law must be correctly estimated. If the law is primarily penal and secondarily invalidating, the main points of interpretation will follow the doctrine of penal laws. If, on the other hand, the law is primarily invalidating and secondarily penal, the main points of interpretation will follow the doctrine of invalidating laws. This is obviously fundamental.

If, then, it be assumed that the invalidating law is primarily penal, the usual excuses from penalties should be applied. This is true even though ignorance does not affect the force of an invalidating law.[37] In the law under discussion, the principal item is the penalty. This penalty presupposes guilt. If, then, the penalty is not incurred, the whole law is inapplicable.[38]

If, however, the invalidating law is not primarily penal, the usual excuses from penal laws will not be of any avail. An invalidating law of this kind includes a penalty as an accessory. This accessory would naturally follow the application of the law itself. Invalidating laws which are introduced primarily for the protection of the society may possess penal clauses, but their first purpose is not to punish a culprit but to protect the community.

The immediately preceeding paragraphs have very briefly considered the effect of penal invalidating laws. While this

[37] Cf. c. 16, § 1; cf. also Van Hove, *o. c.*, p. 172.

[38] Cerato, *Censurae Vigentes* (Patavii, 1921), pp. 7, 48-53, 246; Cappello, *De Censuris* (Taurinorum Augustae, 1925), pp. 47-65; Sole, *De Delictis et Poenis* (Romae, 1920), pp. 13-30. These authors do not insist on the application of the excuse of ignorance to invalidating penal laws, but it is useful to know this doctrine as obvious deductions can be made.

review of the effect of such a law is not necessary for the general purpose of this article, it does nevertheless lead to a statement on the obligation to avoid the infraction of such a law.

It was said earlier that prohibitory invalidating laws always carried an obligation to omit a contrary act. The same statement should be made of penal invalidating laws.

At first sight, it might seem extreme to include laws which merely contain a penal clause but which are not primarily penal invalidating laws. But on reflection it becomes evident that even with only an accessory penal invalidating clause the legislator is prohibiting a contrary act.

The difference between an invalidating law which is primarily penal and an invalidating law which is only secondarily penal is, as far as a prohibition is concerned, a difference of degree, not of species. It is clear that a penal invalidating law prohibits a contrary act. The very penalty itself is a punishment for the performance of the act. It is inconceivable that the legislator would punish an act if it were not prohibited. While it is true that every non-prohibited act is not necessarily valid, or recognized by law and thus invalidity does not necessarily entail punishment, in a penal invalidating law the legislator clearly and openly threatens to punish violations of his law. This threat is a prohibition of a contrary act. In a lower degree, the same argument can be made for an invalidating law which, while not primarily penal, does contain a penal clause. It must be understood that invalidity and penalties are separable. By invalidity the legislator refuses to grant recognition to an act; by penalties he punishes violations of his law. When both invalidity and penalties are united in the same law, the threat of punishment must necessarily fall on the act contemplated by the law itself. Therefore, the act involved is prohibited.[39]

To repeat: prohibitory invalidating laws always oblige that a contrary act be omitted; penal invalidating laws also thus oblige; invalidating laws which neither prohibit nor threaten punishment do not always thus oblige. An obligation, however, can be asserted whenever the rights of others are jeopardized.

[39] Cf. Suarez, *o. c.*, lib. V, cap. XX, n. 7.

A third and final point to be considered in this article on the obligation of invalidating laws is the possibility of impeding this obligation. Can the effect of an invalidating law be impeded so that its obligation is suspended? The answer to this question again demands a division between invalidating laws which immediately operate and invalidating laws whch must wait for a judicial sentence before they operate.

In regard to invalidating laws which immediately operate no impediment can postpone their operation. By impediment is meant anything the subject of the law could place to hinder or postpone the operation of the law. Any legitimate excuse from the law is not an impediment in this sense. Invalidating laws which immediately operate do so because of the will of the legislator. In these laws, he has eliminated any necessity for judicial declaration of nullity or of judicial condemnation.

Laws, however, which require declaration of nullity or its pronouncement as a condemnatory sentence can be impeded. Whenever this impediment is placed the obligation of the law is suspended.

All kinds of impediments can thus hinder the operation of such invalidating laws. The first general group of impediments would be those which would of themselves prevent a court from reviewing an act contrary to an invalidating law. Acts, for instance, which are secret, or are of no specific public interest but which are controlled by invalidating laws may never be brought to the attention of a court. No one who committed an act contrary to an invalidating law would be obliged to present this act for judicial adjudication. This would obviously be admitted where a penalty is involved. But, it would be equally applicable where the law does not establish a penalty. Suarez would even permit that the act contrary to law be concealed [40] because, as he says, the law itself is not thereby violated. However, he does advise against this practice, for the act should be rescinded.

The impeding in this way of the application of an invalidating law is closely associated with the question of the validity of an act before its judicial adjudication. Hence, the usual prob-

[40] *O. c.*, lib. V, cap. XXI, n. 2.

lems of whether such a law is really a rescissory law will once again be confronted. It should be unnecessary to analyze these problems again, for the same arguments presented before and the same conclusions arrived at before would again be stated. The reason why the discussion of the impeding of an invalidating law must be offered is because such laws are commonly considered not as rescissory laws but as true invalidating laws. Hence, some consideration must be given to this common opinion.[41]

If the law does not immediately invalidate an act or disqualify a person from acting it can be impeded by a refusal to implore the aid of a court. In a contract, for instance, both parties may be willing to accept the condition of the contract and refuse the aid of the court. Or again, only the party suffering a disability may be unwilling to seek redress. In whatever way this refusal to seek redress may be manifested it impedes the effect of the invalidating law.

The invalidating law can likewise be impeded by the refusal of the judge to declare or pronounce sentence.[42] Since the law is inoperative until the court applies it, this refusal is sufficient to impede the law. It is of little consequence whether the judge decides that the act is not conemplated by the law and therefore refuses to act or deliberately and maliciously refrains from exercising his ministry.

The inactivity of the court can likewise be procured by malice other than its own. The source of this inactivity is immaterial as long as it is required by law that a court intervene to declare an act invalid or to pronounce it invalid by sentence.

Prescription can also impede the effect of an invalidating law. Such prescription can be secured both against a person who has a right to petition for the declaration of nullity and against a sentence which actually declared an act null and void but which sentence was itself invalid.[43]

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[41] Cf. pp. 554-561.

[42] Cf. Suarez, *l. c.*

[43] Cf. cc. 1892-1897.

THE CHANCELLOR AS DELEGATE OF THE BISHOP

IN the United States the diocesan chancellor has become a person of notable dignity. This attitude seems to be due to the fact of the chancellor's importance as a delegate of the bishop. It is of common knowledge that ordinarily the chancellor is delegated for the exercise of many of the powers of the Ordinary. This delegation is not given him by the Code, for the general law defines his duty in the diocesan administration only as that of archivist-notary. The power which the chancellor possesses outside of this sphere of duties comes to him, not *a iure,* but *ab homine,* that is, through a mandate of the Ordinary. It is to be further noted that when these powers are delegated to him they do not belong to the office of chancellor as such, but are delegated to the person of the priest, who, at the same time, happens to be the incumbent of that office.

That the bishop can grant these powers by way of delegation either in whole or in part is clearly evident from the general law on the matter of delegation.[1] The question for discussion in this article is not concerned with the possibility of the delegating of a priest to act for the Ordinary in certain matters. Rather, it inquires whether the practice of habitually employing the priest who is the chancellor for the continual and universal exercise of delegated jurisdiction is contrary to the spirit of the Code.

Apart from all effort to explore the concept of delegation as such, it is nevertheless in place to mention a few points about delegation, in view of this present discussion about the practice of granting delegated power to the chancellor.

The delegation of power connotes a human act. Consequently any such act of delegation can be nullified by those

1 "Qui iurisdictionis potestatem habet ordinariam, potest eam alteri ex toto vel ex parte delegare, nisi aliud expresse iure caveatur"—Canon 199, § 1.

factors which vitiate the natural act itself in its capacity of a human act. Such factors include absolute violence, substantial error and antecedent ignorance. But above all, an act of delegation is a juridical act and hence is governed by the provision of the positive law.[2]

Practical necessity is the fundamental basis for granting delegation. When the delegation is *ab homine* this necessity is determined by the difficulty of exercising jurisdiction on the part of one and the same person who is constituted in ordinary power. Such a difficulty can arise from the peculiar circumstances of the place, from the pressure of a multiplicity of activities, or again, from some moral or physical impediment.[3]

Though canon 199 states that ordinary power can be delegated *ex toto,* this does not mean that it can be done in such a way as to imply practically the abdication of the ordinary powers or again that the Ordinary can unburden himself of all his duties.[4] Excessive and imprudent delegations, though not to be considered as invalid, are illicit.[5]

When granting a mandate for delegation the Ordinary should be specific for there is no place for vagueness in the law. In other words, he should state whether his authority is granted for a certain time, for a certain species of acts, or for a definite act only. The fact that the Ordinary should be clear in his mandate is evident. Such clearness is demanded in order that the delegate may know the limits of his power. Without this knowledge the delegate could scarcely proceed to act, for fear that he would be exceeding the limits of his power and in so doing would at the same time be acting invalidly.[6]

From these principles, then, it is evident that if the Ordinary wishes to delegate his power of jurisdiction to the chan-

[2] Cf. Kearney, *The Principles of Delegation,* The Catholic University of American Canon Law Studies, n. 55 (Washington, D. C.: The Catholic University of America, 1929), p. 75.

[3] Crisci, "De delegatione a iure in iure canonico vigenti,"—*Apollinaris,* X (1937), 513-535, esp. p. 514.

[4] Kearney, *op. cit.,* p. 77.

[5] C. 3, 28, X, *de officio et potestate iudicis delegati,* I, 29.

[6] Can. 203, § 1.

cellor, natural equity demands: (1) that the fundamental basis for delegating his authority be present in so far as a practical necessity demands this delegation in view of some difficulty in personally exercising his authority; (2) that the Ordinary do not delegate his jurisdiction in such a way as to unburden himself of all jurisdictional duties, and that the delegation of jurisdictional powers be not excessive or imprudent; and (3) that the limits of the power delegated to the chancellor be precisely defined in the mandate of jurisdiction.

Now, relative to the practice of delegating authority to the chancellor, the question may be asked: To what extent may the bishop grant his jurisdictional powers to the chancellor?

It is evident from canon 199 that the Ordinary does have the power of giving delegated jurisdiction to the priest who holds this office, and nothing can be said against the practice of employing the chancellor rather than another priest. It is evidently more convenient that the chancellor be employed as delegate of the bishop, for from the nature of his office he is more often present at the episcopal curia. Whenever the Ordinary himself cannot attend to certain matters, either because of the multitude of affairs or because of his necessary absence, it is a convenient arrangement to delegate the chancellor who is always at hand. The question then narrows down to this; namely, Is it a juridically correct practice for the bishop to grant to his chancellor habitual and general powers of delegation to be fully and continually exercised after the manner of a vicar delegate? [7]

If there existed anywhere the practice of granting such powers to the chancellor, one could of course raise little, if any, doubt about the validity of the granted delegation, for by virtue of canon 199 the bishop must be recognized as being able to delegate his ordinary powers in their entirety. Furthermore, the law nowhere presents any text which either expressly

[7] A vicar delegate is a priest who takes the place of a vicar general in mission territories that are ruled by a vicar or prefect apostolic. He receives full jurisdiction from his Ordinary as a *delegate* and thus differs from the vicar general in a diocese who has *ordinary* jurisdiction as deriving from the office which he holds.—Cf. *AAS,* XII (1920), 120.

or in some equivalent fashion, according to the norm of canon 11, invokes any sanction of invalidity against such an act of habitual general delegation. But as a question of policy, such a practice is contrary to the spirit and intent of the law. This appears certain because of the reasons here subjoined.

To grant to the chancellor such wide powers of delegated authority that he will practically administer most of the spiritual and material rule of the diocese and actually issue most if not all of the dispensations himself, so that the bishop's diocesan jurisdiction is exercised in the main not through *ordinary* power but rather through the chancellor's *delegated* power, is in effect to place the chancellor in the position of a vicar delegate of the bishop. Under such circumstances the chancellor would be exercising, in the same sense as a vicar delegate in mission districts, the full sphere of his bishop's ordinary powers through the latter's act of universal delegation. But the Holy See has defined that the vicar delegate exercises by way of delegation such jurisdictional functions as the vicar general exercises by ordinary jurisdiction where the diocese is established. The office of vicar delegate is set up in mission territory *in place of* the office of vicar general of the diocese.[8] In other words, the vicar delegate is to be appointed only in such places and under such conditions for which the law does not recognize the possible appointment of a vicar general, that is, in mission territories which are ruled by vicars or prefects apostolic. He exists there *instead of* a vicar general. By inference one must conclude that he cannot, in agreement with this provision of the law, exist in a diocese *alongside of* a vicar general, for thus he would acquire by delegated authority the very functions which the law intends to belong to the vicar general, who is to exercise them through ordinary power.

If the chancellor were in fact to exercise so much delegated jurisdiction that he could be considered as a vicar delegate of the bishop, this would evidently do away with much, if not most or even all of the exercise of ordinary authority through the vicar general. It would be a practice contrary to the

[8] S. C. de Prop. Fide, ep., 8 dec. 1919—*AAS*, XII (1919), 120.

spirit of the law, which provides for the aid of the bishop in the jurisdictional rule of his diocese through an office to which belongs *ordinary* jurisdiction, namely that of the vicar general, and not through a vicar who exercises delegated power. This practice, if it were continued, would surely tend to leave to the vicar general little else than an office only, since the powers of his office would at the most be seldom called into use. In actuality the position of the vicar general would simply become one of honor next to that of the bishop, but would cease, at least in fact, to be one of jurisdiction concurrent with that of the bishop. In places where such a trend exists this very result is noticeable. The Code does not contemplate any situation in which the vicar general exercises less jurisdiction over the diocese than does the chancellor or another priest. Quite manifestly, then, any practice that leads to such a result cannot be regarded as harmonizing with the spirit of the law.

This practice of authorizing some priest of the diocese to act after the manner of a vicar delegate and thus to supplant the vicar general in his jurisdictional competence seems to obtain in some Spanish-speaking countries.[9] But there, instead of the chancellor of the diocese, it is rather the secretary of the bishop who exercises this widely delegated jurisdiction. In commenting on this condition Wernz-Vidal admit that the practice is alien to the discipline of the Code and that it ought to be corrected.[10]

Even if the chancellor is not considered as a vicar delegate of the bishop, the practice of granting him full delegated authority to be generally and continually exercised in the rule of the diocese still is a policy which is alien to the discipline of the Code. The law has already provided a legally constituted office, the incumbent of which is to help the bishop in the rule

[9] Cf. Ferreres, *Institutiones Canonicae* (2 vols., Barcinone, 1920), I, 674, footnote; Muniz, *Procedimientos Eclesiasticos* (2. ed., 3 vols., Sevilla: Lib. de Sobrino de Izquiedo [no date]), I, 136.

[10] "In multis curiis ecclesiasticis loco cancellarii existit Secretarius Episcopi, cui multa munera sunt commissa, quae proprie pertinent ad Vicarium Generalem. Qui modus a disciplina Codicis est alienus et facile per convenientem immutationem esset reformandus"—Wernz-Vidal, *Ius Canonicum,* II (*De personis,* Romae, 1928), 690.

of his diocese. Through the institution of the office of vicar general to which is appointed a priest as an *altera persona cum episcopo,* the Code has made provision for filling the very need which manifestly has arisen in those places wherein exists the practice of granting widely delegated habitual powers to the chancellor. If the government of the diocese is beyond the capacity of the bishop alone, the Code orders him to constitute a vicar general who is to lend his aid throughout the entire diocese by means of ordinary power.[11]

This power of the vicar general is meant to be actively employed and is evidently not to be supplanted by the exercise of delegated power through the chancellor. The means desired by the Code for the regularly constituted help to the bishop in the exercise of his diocesan rule is one of *ordinary* and *not* one of delegated jurisdiction. Even though canon 199 makes possible the delegation of the Ordinary's power *ex toto,* it can certainly not be argued that such a possible universal delegation is to be understood in the sense of being a normal means made available by the law with a view to providing an habitual aid for the rule of the diocese; an aid which can be invoked only at the cost of supplanting much if not practically all of the exercise of jurisdiction on the part of the vicar general. If the vicar general is thus practically barred from the exercise of his official powers in view of the chancellor's universal delegation, then indeed there is, *de facto,* placed in the hands of the chancellor the power which the Code reposes in the hands of the vicar general. In a word, the *vicarious* rule in the diocese which should reflect the exercise of a *vicarious* ordinary power is then suppressed to an exercise of authority by a mere delegate. It need hardly be reiterated that such a condition of affairs is not in harmony with the purpose of the general law which professedly looks to the office of the vicar general as the medium whence the bishop is to derive his needed help in the government of the diocese.

The practice of making the chancellor the bishop's plenipo-

[11] "Quoties rectum dioecesis regimen id exigat, constituendus est ab Episcopo Vicarius Generalis, qui ipsum potestate ordinaria in toto territorio adiuvet"—Can. 366, § 1.

tentiary delegate militates against the very concept of the office of chancellor as delineated in the Code. The law seems to consider his duties of caring for the documents in the archives and of being the curial notary as a sufficient burden for the full-time attention of the chancellor, otherwise there would hardly be any justified need of the provision of the law which indicates the possible appointment of a vice-chancellor to help him in his work.[12] The very use of the term *cancellarius* in the law connotes only a function that deals with the drawing up and the taking care of documents, and not with the exercise of delegated power for the government of the diocese.[13] It cannot be legitimately argued that the Code has made possible the appointment of a vice-chancellor for the actual work connected with the care of the documents, thus leaving the chancellor himself more free for the exercise of other duties, for the law makes no distinction; both the chancellor and the vice-chancellor have the same duties in the care of documents. To interpret the law on the duties of the chancellor in canon 372 otherwise would not be in harmony with the legal provision for the interpretation of laws according to the proper signification of the words in the law.[14] When it becomes necessary to use the chancellor for the exercise of delegated powers, it seems more in accordance with the spirit of the law not to speak of him as "chancellor" in this particular function, but rather to call him by some other term, such as the "bishop's delegate." Otherwise the term "chancellor" if it be habitually used in designation of the priest who exercises the delegated powers of the bishop, will come to signify a position not foreseen by the Code when it provided that his principal work consisted in the duties of an archivist-notary.

To argue that the practice of habitually delegating the chancellor for the exercise of general delegation, is a legitimate custom having the force of law would be a valid argument if it

[12] Can. 372, § 2.

[13] In the footnotes of canon 372 on the duties of the chancellor, reference is made to the sources of this law. These sources deal only with the care of documents and not with the exercise of delegated powers.

[14] Can. 18.

could be proved that it is a legal custom. But this can not be proved.

This practice, since it is not according to the law, could only have become a legally binding custom through a continuation of its employment either *praeter* or *contra legem*. But it could not be a legal custom *praeter legem*, since it is evident that the bishop is not bound to follow the practice of employing his chancellor as his delegate whenever he wishes to grant his power to another.[15] Nor can it be considered as a legal custom *contra legem*. Since the advent of the Code there has not been sufficient time for a custom either outside of or contrary to the law to receive binding force.[16] And at the time of the promulgation of the Code it could not have been accepted as an immemorial custom still binding,[17] because a custom can have the force of law only with the consent of the competent superior,[18] which consent was lacking, as is evidenced from a reply of the Holy See to a bishop of the United States in 1896, when he asked for authorization to delegate certain powers to the chancellor.[19] In this private reply the Holy See indirectly disapproved of granting delegated powers to the chancellor. It therefore appears unjustified to argue that the practice of granting delegated powers to the chancellor is a custom *having the force of law*. The most that could be said for the practice is that it is a customary convenient arrangement that may be tolerated under certain circumstances.

The mind of the Holy See on the question of granting habitual delegation to the chancellor is not found expressed, outside of the Code, in any published document except in the private reply just mentioned. Perhaps it is the only occasion on which any published correspondence with Rome mentions this subject under discussion. Since the reply from Rome seems

[15] "Consuetudo praeter legem, quae scienter a communitate cum animo se obligandi servata sit, legem inducit . . ."—Can. 28.

[16] ". . . per annos quadraginta continuos et completos praescripta."—Can. 27.

[17] Can. 5.

[18] Can. 25.

[19] S. C. Prop. Fide, 22 dec. 1896, to the Bishop of Pittsburgh—in *Analecta Ecclesiastica*, VI (1898), p. 10; cf. *Le Canoniste Contemporain*, XXI (1898), 181.

to indicate that the Sacred Congregation was not in favor of the idea of granting delegation to the chancellor, it will be of some profit to examine the reply more closely.

The Bishop of Pittsburgh had asked for permission to subdelegate to the chancellor certain matrimonial faculties which he had received and could already grant to his vicar general. He had given as a reason the fact that the vicar general resided in another city away from the bishop, but that the chancellor was at hand in the bishop's curia.[20] In reply the Sacred Congregation ignored the idea of subdelegating the chancellor. It told the bishop to appoint in the city where the bishop resided, another vicar general through whom these faculties could be exercised.[21] Even though the Congregation permitted the faculties in question to be delegated to an ordinary priest in the outlying districts of the diocese,[22] it appeared to object precisely to the fact of granting these faculties to the chancellor, and asked instead that a priest be nominated from the city as a vicar general.[23] The meaning was evident. If the bishop wished to have the chancellor or any priest in the Curia to exercise these faculties, he could do so by appointing him in the capacity of a second vicar general in the diocese.

Though it has been shown that to provide for the continuous exercise of the jurisdiction of the Ordinary through the dele-

20 "... ut infrascripto concedere dignetur potestatem subdelegandi Cancellario Episcopali, qui secum in domo residet, easdem facultates aeque ac Vicario Generali."—*Analecta Ecclesiastica,* VI (1898), 10; *Le Canoniste Contemporain,* XXI (1898), 181.

21 "Per duas epistolas in mense novembri ... petebat facultatem sub-delegandi easdem facultates etiam cancellario residenti in Curia, si Vicarius Generalis non ibi resideat ... Si igitur Amplitudo Tua difficilem putat esse accessum ad Vicarium Generalem si alibi resideat, et opportunius esse ut facultates habeat aliquis qui degat in Curia, potest uni alterive sacerdoti in remotioribus dioecesis partibus degenti facultates delegari ad normam formulae, et alium sacerdotem in urbe residentiali habitantem vicarium suum Generalem nominare cui soli inter Vicarios eiusmodi poterunt dictae facultates subdelegari." —*Loc cit.*

22 "Potest uni alterive sacerdote in remotioribus dioecesis partibus degenti facultates delegari ..."—*Loc. cit.*

23 "Si Amplitudo putat ... opportunius esse ut facultates habeat aliquis qui degat in Curia, potest ... sacerdotem in urbe residentiali habitantem, Vicarium suum Generalem nominare."—*Loc. cit.*

gation of habitual powers to the chancellor is contrary to the purpose and intent of THE CODE OF CANON LAW, this nevertheless does not mean that the convenient usage of employing the chancellor as an *occasional* delegate of the bishop, as is frequently done in the United States, is alien to the law. For, as it has been pointed out, canon 199 gives the bishop the authority to delegate his power, and since it is not expressly forbidden for the chancellor to act as an occasional delegate, the Ordinary can certainly so employ the priest in this office. It can not be denied that the convenience of this office's being in the curia, bringing an association of close contact between the chancellor and the Ordinary, affords a logical reason for the selection of the chancellor as an occasional delegate when the bishop and vicar general are to be absent. Since the chancellor is the one who generally draws up the document for the issuing of the dispensation, it is simply a rule of convenience that to him also be given the delegated power of granting the dispensation when some one or other has to be delegated because of the absence of the Ordinaries. As long as the chancellor's possession of such delegated power connotes but an occasional or temporary grant which is entrusted to him in such a way as not to discredit in practice the need of a vicar general, the use of this procedure in itself is not contrary to the spirit of the law.

However, it is of common knowledge that very often in the chanceries where the chancellor is employed as the one through whom dispensations are granted by delegated power, it becomes an habitual practice so to employ him instead of the vicar general. Under such circumstances the vicar general is not afforded the opportunity to function fully in accordance with the law as far as the *actual* exercise of his jurisdiction is concerned. Therefore it seems to be more according to the wish of the Code that the bishop should only sparingly employ as his delegate, the priest who holds the office of chancellor, in order that he will not infringe upon the concurrent exercise of diocesan jurisdiction through the ordinary channel of the vicar general, whose office has been established by law

as the medium through which the bishop will derive needed help in his administrative government of the diocese.

The same norm seems to hold also relative to the exercise of other powers in the administration of the rule of the diocese besides the issuing of dispensations. If to the chancellor is delegated the responsibility of property administration in the diocese, or the duty of receiving and arbitrating the complaints of the clergy and the laity in minor matters, or the authority of deciding as chancellor whether or not certain petitions have sufficient merit to be brought to the attention of the diocesan tribunal, or the performance of other like functions of diocesan administration which by general law do not belong to the office of chancellor, such a practice seems alien to the mind of the legislator as reflected in the discipline of the Code. For in such a practice there is a supplanting of the exercise of an *ordinary* jurisdiction, which is to be supplied through a vicar general and an *officialis* (when the bishop can not personally attend to these matters), by the application of a *delegated* jurisdictional rule. It would gradually lead to an understanding in the diocese that the chancellor, *qua chancellor,* holds an office through which much of the ruling of the diocese is done, and there would be attributed to the office itself an honor and a function that is evidently not intended by the law. For it would become altogether apparent that the chancellor does not simply act as a delegate of the bishop on occasion, rather it would appear that the bishop has set up a new office to which attaches the permanent exercise of his delegated powers. This condition seems to exist *de facto* in many parts of the United States and Canada. This is evident from the important position which attaches to the chancellor in those places.[24]

But can not the bishop constitute a new office, it may be argued, or could he not make an innovation in the office of chancellor by giving to him, *qua chancellor,* an exercise of jurisdiction in the administration of the diocese?

[24] "In the United States the diocesan chancellor has become a unique personage of distinction, influence, power and administrative responsibility."—Doheny, *Canonical Procedure in Matrimonial Cases* (Milwaukee: Bruce, 1938), p. 54.

According to Maroto,[25] although an ecclesiastical office must, in virtue of canon 145, be instituted *by law,* it is not necessary that this be the *general* law. Sometimes an office may receive its institution through particular legislation, for instance, a diocesan law. Thus the Ordinary who has legislative power in his own territory, has the requisite capacity to institute by a diocesan law some office that is unrecognized in the general or particular law, and also to determine its rights and obligations. This is only for his own diocese. Maroto, however, states that this competency of the bishop extends only to some kind of minor office.[26] However true this may be, it is not directly significant for the question in hand. For if the bishop keeps the office of chancellor but at the same time attaches to this office functions not specified in the law, then it is not the question of the institution of a *new* office, but rather of an *innovation* in an office that is already established by the general law. By this *innovation* in an ecclesiastical office is understood some change from the state that it had originally in the law. This change may be reflected either in regard to the temporal or spiritual rights and obligations, or in regard to its localized see, its territorial extension, or its specific character.[27]

And so it may be asked, can the bishop make such an innovation in the office held by the chancellor that *to his office* there will thenceforth attach the right of exercising some jurisdiction in the administration of the diocese, a jurisdiction that is over and above the right of exercising authority as an archivist-notary, which right is the only one enacted in the general law as pertaining to the office of chancellor?

If the bishop were to do so, then the power of jurisdiction which the chancellor would obtain through his office would have to be either an ordinary or a delegated power. But since

[25] *Institutiones Iuris Canonici* (2 vols., Matriti, 1919), I, p. 679, n. 582.

[26] "...item a iure particulari, imprimis dioecesano, possunt esse instituta in genere nonnulla officia ecclesiastica, quae deinde numerice ab homine eriganter; denique nihil impedit quominus ... Ordinarius valeat aliquando instituere in casu particulari officium aliquod in iure tam generali quam particulari incognitum, eiusque iura et obligationes determinare; ... Ordinarii sunt competentes generatim ad officia minora, salvis limitationibus ..."—Maroto, *loc. cit.*

[27] Maroto, *op. cit.*, I, 678.

delegated power is defined as that which is granted to a person,[28] the attached power as inherent in the office, could not be of a *delegated* character. On the other hand, since ordinary power is defined as that which *by law* is annexed to an office,[29] the bishop could only effect this annexation of power to the office by means of a diocesan law which would entitle it to enjoy the status of *ordinary* power. But such a procedure would imply a disregard of the discipline of the Code inasmuch as the Code has established the office of vicar general, which enjoys ordinary power, for the purpose which the bishop by such a procedure would want to serve. In place of such an innovation relative to the office of chancellor, the bishop could readily appoint another vicar general if the extent of the diocese or the multiplicity of administrative duties demanded more help than the one vicar general could lend. The law itself in canon 366 allows this.

Thus the practice of employing the chancellor as a plenipotentiary episcopal delegate in the exercise of diocesan administration, or even the possible attempt to grant this jurisdiction to the office as such, appears altogether alien to, if not also in absolute disharmony with, the discipline of the Code. From this conclusion there seems to be no escape.

The preceding comments have shown that the granting of the power of habitual delegation to the chancellor or the attempt to attach ordinary jurisdiction for ruling the diocese to his office as such militates against the discipline of the Code. Nevertheless it must be again remarked that, since canon 199 permits the delegation of ordinary jurisdiction, and since necessity often demands that this be done for the better administration of the diocese when for various reasons the Ordinary is not at hand, practical convenience seems to demand that the priest who is the chancellor is also the one who should be employed for the occasional exercise of such delegated jurisdiction. He is most generally at hand because of the nature of

[28] "Potestas iurisdictionis . . . delegata, quae commissa est personae"—Can. 197.

[29] "Potestas iurisdictionis ordinaria ea est quae ipso iure adnexa est officio" —Can. 197.

his duties in the diocesan curia. Inasmuch as it is a common practice in the United States occasionally to delegate extensive powers to the chancellor, it is the purpose of the present article to discuss a few practical questions that may arise with regard to the actual exercise of some of the delegated faculties granted to the priest who is at the same time the diocesan chancellor. For instance, can the chancellor subdelegate his own delegated power to dispense in some cases of matrimonial impediments, or can he as a bishop's delegate designate others to assist at marriage?

According to canon 199, § 2, the bishop has the power to subdelegate the delegated powers which he has received from the Holy See. He may grant this subdelegation either for a single act or for habitual exercise, except in the case that the Holy See has selected him as its delegate in view of a personal qualification, or when subdelegation has been prohibited.[30]

Now, among the delegated powers in the faculties received from the Holy See which can be habitually delegated are the faculties to dispense from the matrimonial impediments of mixed religion and of disparity of worship.[31] The bishop then can validly give these faculties to his chancellor, so that this priest in turn can habitually grant these dispensations by his own subdelegated authority, with the understanding of course that the conditions necessary for granting them be realized.

1. But here a question may arise. Can the chancellor in turn, delegate these faculties even for a single case to another priest for the granting of a dispensation of this kind? This can not be done, for the chancellor is already exercising in this case a *subdelegated* power of the Holy See as deriving from his local Ordinary. Without an express concession he can not again subdelegate this power to another even for a single case.[32] Therefore in practice, it will not be a valid act if the

[30] "Etiam potestas iurisdictionis ab Apostolica Sede delegata subdelegare potest sive ad actum, sive habitualiter, nisi electa fuerit industria personae aut subdelegatio prohibita."

[31] An English translation of the rescript of the quinquennial faculties (Formula IV) granted to the bishops of the United States in 1939, is given in Bouscaren, *Canon Law Digest*, supplement, 1941, pp. 26-38.

[32] "Nulla potestas subdelegata potest iterum subdelegari nisi id expresse concessum fuit"—Can. 199, § 5.

chancellor, even though he have an habitual subdelegated power, grants to the vice-chancellor or any other priest the power to dispense from the impediment of disparity of worship or of mixed religion if, for example, he has to be away from the chancery office when a petition for such a dispensation arrives. The reason for which he may consider that he has such a power may possibly arise from a misunderstanding of the third paragaph of canon 199, which speaks of power for a universal number of cases *delegated* by one who, as an intermediate to the Holy Father, possesses ordinary power. For such a *delegated* power can in turn be subdelegated in individual cases.[33] The law reads " delegated " and not " subdelegated " power. The difficulty arises from the fact that since the chancellor in other things is often the *delegate* of the bishop, he might also consider himself as a delegate of the bishop in exercising the faculties which he has received through the bishop from the Holy See. In reality he is only a *subdelegate*. In this case he has no delegated power, and consequently can not apply canon 199, § 3, in order to subdelegate that power in individual cases, even though he himself has a subdelegated power which he may use quite comprehensively, and even though in other things he may simultaneously possess a delegated power which derives from the bishop's ordinary jurisdiction. Therefore a dispensation from the impediment of mixed religion or disparity of worship granted by a priest or a vice-chancellor by authority of the chancellor is invalid, unless the permission to grant such a further subdelegation has been expressly conceded by the Holy See.[34]

2. There are other faculties which are granted by the Holy See to the bishop himself. These are to be exercised personally by the Ordinary and can not be subdelegated to the chancellor. One of these faculties, for example, is the power of granting a *sanatio in radice* for a marriage attempted before a

[33] " Potestas *delegata* ad universitatem negotiorum ab eo qui infra Romanum Pontificum habet ordinariam potestatem, potest in singulis casibus subdelegari."

[34] " Nulla subdelegata potestas potest iterum subdelegari, nisi id expresse concessum fuerit "—Can. 199, § 5; cf. also § 4.

minister or civil officer when an impediment of mixed religion or disparity of worship exists.[35]

There are two methods open to the Ordnary in the exercising of this faculty personally: Either he may himself directly concede this favor, or he may commit another priest, such as the chancellor, to execute this favor in *forma commissoria.* According to canon 54 the execution of a rescript according to the *forma commissoria* can be committed to a minister in two ways. Either the chancellor (or any other priest) is employed as a mere minister (*nudum ministerium*) with no choice but to grant the favor as a simple executor (*in forma commissoria necessaria*), or the chancellor is commissioned in such a manner that he may grant it or deny it as he wills (*in forma commissoria voluntaria*).[36]

Now the question arises: Even though the Ordinary is not enabled to subdelegate this faculty to his chancellor, could he not communicate it in *forma commissoria voluntaria?* In other words, could the bishop commit to the chancellor the execution of a rescript in which he grants the sanation, dependent on the judgment of the chancellor himself whether or not it should be granted, even when the conditions necessary for the sanation are present? The bishop could not do this validly because he would be making the chancellor actually a voluntary executor, and a voluntary executor of a rescript is truly acting simply as a delegate.[37] Since the bishop is prohibited in the proposed case from subdelegating his power, he is also prohibited from entrusting the *voluntary* execution of it to his chancellor, for thus the chancellor would actually be constituted as the bishop's subdelegate.

Therefore if the bishop wishes to employ his chancellor in the granting of this sanation but at the same time desires to act personally as the faculty demands, he may employ the

[35] Bouscaren, *op. cit.,* p. 28.

[36] Cf. Maroto, *Institutiones Iuris Canonici,* I, p. 310, n. 278, sub littera "c"; Cappello, *De sacramentis,* III (*De matrimonio,* Romae, 1933), n. 280.

[37] "Executor voluntarius, qui melius vocaretur delegatus, est ille, cui tribuitur potius facultas exequendi, seu committitur ipsa concessio gratiae"—Maroto, *op. cit.,* I, p. 331, n. 288; cf. Vromant, *Ius Missionariorum,* V (*De matrimonio,* Louvain, 1931), 107.

chancellor only as a *necessary* executor or as a simple agent to carry out the bishop's already determined wish. In other words, the bishop grants the rescript to the parties directly, but provides that it will have its effect only when the chancellor executes it after having ascertained that the necessary conditions are fulfilled. The chancellor can not deny the bestowed favor once the essential conditions are fulfilled.[38]

A somewhat parallel procedure may be validly used by the bishop should he wish to grant certain extraordinary faculties, which he has as delegate of the Holy See, to certain priests through the ministry of the chancellor, without making the chancellor a subdelegate. He may validly proceed in this manner: The bishop delegates his power of appointing, say, parochial assistants or perhaps chaplains, to his chancellor. Then he subdelegates directly the extraordinary faculties he has received from the Holy See to the parochial assistants or chaplains, as the case may be, at that moment in which the chancellor actually appoints them. In this procedure the chancellor acts only as a necessary executor of the will of the bishop in the granting of the faculties, even though he acts as a true delegate of the bishop in the appointing of the assistants or the chaplains. The will of the chancellor never enters into the action of the passing of the faculties to these priests; his will enters only into the action of appointing them to the position in which, by their very appointment, they immediately receive the extraordinary faculties from the bishop. In this matter of the faculties, the chancellor acts as a mere executor or minister. However, were the bishop to recognize the right of the chancellor to withhold for any reason whatsoever the granting of the faculties even when the assistant or chaplain has been appointed, then the chancellor will no longer be a mere minister, but an actual subdelegate of the Holy See. Further subdelegation beyond the chancellor would in this case be invalid, unless this were expressly permitted by the Holy See.

A procedure more in harmony with the spirit of the Code is to employ the vicar general in place of the chancellor, for in

[38] C. Cappello, *op. cit.*, n. 280; Vromant, *op. cit.*, p. 107.

this case there would be invested the same power in the vicar general as in the bishop. As *altera persona cum episcopo* the former is able to exercise faculties given personally to the bishops, unless it is evident that in rare cases the Holy See would employ a bishop in the exercise of a faculty by reason of the bishop's own personal excellence (*industria personae*).

3. In regard to the next point of discussion which treats of the question whether the chancellor as delegate of the bishop can designate others to assist at marriages, the term "delegation" is used for this act of granting permission to assist at marriage as it is also so employed in the Code,[39] though it is acknowledged that a priest who assists as an officially qualified witness does not really exercise jurisdiction in the strict sense.[40]

It may be asked in this connection whether the bishop can delegate to the chancellor his own capacity, which he himself has by ordinary jurisdiction, of delegating priests for assistance at marriages, so that the chancellor can himself appoint a determinate priest to assist at a determinate marriage according to canon 1096, § 1. The Ordinary has the power from canon 1094 both to assist and to delegate for assistance at marriage. Since this power is *ordinary*, one must naturally assume that the bishop has the ability to delegate *ex toto* to the chancellor unless there be some specific provision which in law forbids this. There are those who, in abstracting from other provisions of law than the general principle of canon 199, § 1, might contend that by delegation of general powers of the Ordinary, the chancellor could both assist and delegate to assist at marriage, whether for a single marriage or for all marriages throughout the diocese. Thus, in canon 1095, § 2, in place of the term "Ordinary," substitute the term "chancellor" as delegate of the bishop. This would accordingly endow the chancellor with a power equivalent to that accorded to the Ordinary. With the possession of this power the chancellor could then

[39] Canons 1094, 1098.

[40] "Assistentia matrimonio . . . non est actus iurisdictionis . . . nihilominus huiusmodi assistentia habet analogiam cum iurisdictionis, idcirco quae dicuntur de iurisdictione, dicenda quoque sunt aliqua ratione de assistentia"—Cappello, *De Sacramentis*, III (*De matrimonio*), n. 670, n. 672.

proceed to designate a determinate priest for assistance at a determinate marriage according to the rule of canon 1096, § 1, without any further permission for an individual case from the Ordinary.

However this line of argumentation is definitely untenable, and the chancellor is unable to act as the general delegate of the bishop to appoint officially a priest to assist at a marriage. Nor would he himself be able to assist at even one marriage, in his capacity of a general delegate of the bishop.[41]

When canon 199, § 1, by general rule permits ordinary power to be delegated, it adds the qualifying clause, *nisi aliud expresse iure caveatur.* Canon 1096, § 1, reveals such a law whereby the general rule of canon 199, § 1, must yield to the very exception for which it left room. All general delegations to assist at marriage are excluded by law save in the case where this may be given to parochial assistants within the limits of the parish to which they are attached.[42] Thus it is certainly evident that the Ordinary can not grant the chancellor general delegation to assist at marriages throughout the diocese. And if he can not himself assist through this supposed general delegation, then it appears illogical to maintain that he can be given a general power to appoint others to assist. This would be contrary to the philosophical principle of *nemo dat quod non habet* and against the juridical principle of *nemo plus iuris transferre in alium, quam sibi competere dignoscatur.*[43]

Therefore if the chancellor grants to a priest the power to assist at a marriage, without himself being *specially* authorized to subdelegate his own delegation to assist at *that* marriage,

[41] The present discussion prescinds from the fact that the chancellor *as an assistant pastor* could obtain a general delegation to assist at marriages within the parish wherein he is appointed. It further prescinds from the fact that the chancellor could be delegated for assistance at a specific marriage with the faculty of subdelegating some other priest to assist at the same marriage; cf. *Pontificia Commissio Interpretationis,* 28 dec. 1927, ad IV, n. 2—*AAS,* XX (1928), 62.

[42] "Licentia assistendi matrimonio concessa ad normam can. 1095, § 2, dari expresse debet sacerdoti determinato ad matrimonium determinatum, exclusis quibuslibet delegationibus generalibus, nisi agatur de vicariis cooperatoribus pro paroecia cui addicti sunt; secus irrita est"—Can. 1096, § 1.

[43] Reg. 79, R.J., in VI°.

or without a general delegation within a certain parish as a parochial assistant, then his grant is certainly invalid, for under such circumstances he lacks all power, whether as deriving from any precept of the law or as deriving from the supposed delegation.

An objection might be raised: If the bishop delegated all the powers and faculties of the vicar general to the chancellor or made the chancellor a so-called vicar general *in matrimonialibus* or *in spiritualibus,* could not the chancellor then appoint a priest to assist at marriage, for then he would be able to do all that is in the power of the vicar general to do, which includes this power of delegation? The answer is that this arrangement would make the chancellor no more able to act than if he were a general delegate. For the chancellor would then be either a vicar general with ordinary power, or not a vicar general with only delegated power at the most. The bishop can not delegate to a chancellor the powers of a vicar general and then consider him as an Ordinary. Since the vicar general holds an office, the content of which consists of ordinary jurisdiction, the legal provision of the law must be followed in establishing that office, otherwise the appointment will not be that of a vicar general.[44] Since under this proposed arrangement the chancellor would have the powers of the vicar general only by delegation, the same condition would exist as has already been mentioned: In the event of general delegation of power to the chancellor, he would not be able to appoint any priest for assistance at any marriage, nor would he be able to assist personally at any marriage; in the event of a particular delegation for a particular marriage, he would of course be qualified for valid assistance, but he would not be able to appoint any other priest for this determinate marriage, unless the one who delegated the chancellor for the particular marriage, at the same time expressed the authorization of a further subdelegation.

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[44] Cf. canons 147, 148 and 366.

HOSPITAL BAPTISMS

SO zealously does the Code guard the proper pastor's right solemnly to baptize those over whom he is given competence in this matter that only reluctantly does it free a travelling person from the obligation of seeking solemn baptism at the hands of his own proper pastor. A *peregrinus* must return to his own parish for the licit reception of solemn baptism if such a journey can be undertaken conveniently and without delay (*facile et sine mora*).[1] Hence, unless the person is excused in view of the circumstances of inconvenience and delay, his own proper pastor retains the right solemnly to baptize him regardless of his nearness to or distance from his proper parish church.

That a person be obliged to return to his own parish, however, both of the conditions mentioned by the legislator must be present simultaneously. If either one of them is lacking, e.g., if one could go back conveniently but only after an undue delay, or if one could return immediately but only with unavoidable inconvenience, then the person may receive solemn baptism from the local pastor, inasmuch as the approach to the proper pastor no longer remains a matter of duty.[2] It seems that the judgment concerning the existence of these circumstances rests solely with the subject for baptism or with his parents or guardian.

Regarding the two excusing factors indicated by the Code there exists much latitude of interpretation precisely because it remains a difficult task sharply to determine when a journey back to one's parish church may or must be considered a matter of inconvenience. In the case of an infant the delicate

[1] Canon 738, § 2. Etiam peregrinus a parocho proprio in sua paroecia sollemniter baptizetur, si id facile et sine mora fieri potest; secus peregrinum quilibet parochus in suo territorio potest sollemniter baptizare.

[2] Blat, *Commentarium Textus Codicis Iuris Canonici,* (5 vols., in 6, Romae, 1921-1927), Lib. III, pars. 1, n. 21.

condition of its health is a factor that should never be overlooked. There are also to be considered, for adults as well as for infants, such factors as the element of distance, the condition of the roads, the availability of transportation, the kind of weather, the consumption of time, the amount of expense, the selection of approved sponsors, the probable emergence of ill will, the sacrifice of appreciable material gain, etc. In the case of an adult the distance from his home parish must ordinarily be greater and the exposure of his health must of course be more definite than in the case of an infant before any acceptable excuse is had for the reception of solemn baptism from the local pastor.[3]

With respect to the avoidance of delay authors are in agreement that the phrase *sine mora* should be interpreted as identical in meaning with the word *quamprimum* of canon 770.[4] The common opinion regards the administration of baptism as taking place *sine mora* or *quamprimum* as long as it is conferred within three to eight days.[5] Woywod, however, maintains that common sense forbids an interpretation which limits the extension of time to a period of but three days. He holds that, unless the diocesan statutes rule otherwise, the second Sunday after birth still falls within the indicated time for the conferring of baptism *quamprimum*. He concedes that even this extended period may at times prove too much of a limitation inasfar as it involves any exposure of the child to uncontrollable risks, for all related eventualities must be duly

[3] Augustine, *A Commentary on the New Code of Canon Law,* (8 vols. [Vol. IV, 6. ed.], St. Louis: B. Herder, 1931), IV, 39; Ayrinhac, *Legislation on the Sacraments* (New York: Longmans, Green and Co., 1928), p. 18; Bouuaert-Simenon, *Manuale Juris Canonici* (3. ed., 3 vols., Gandae et Leodii: Dessain, 1930), II, n. 19, sub. II.

[4] "Infantes quamprimum baptizentur; ..."

[5] S. C. de Prop. Fide, litt. (ad Vic. Coreae), 11 sept. 1841—*Coll.*, n. 939 and *Fontes,* n. 4795; Cappello, *De Sacramentis,* I, n. 149; Augustine, *Commentary,* IV, 86; Merkelbach, *Summa Theologiae Moralis* (Ed. alt., 3 vols., Parisiis: Declée, 1939), III, n. 148; Aertnys-Damen, *Theologia Moralis,* (13. ed., 2 vols., Taurini: Marietti, 1939), II, n. 55; *et alii.* Sabetti-Barrett (*Compendium Theologiae Moralis* [27. ed., New York: Pustet, 1919], n. 662, quaes. 7) set a maximum period of three weeks.

weighed and every pertinent circumstance must be judiciously considered. No law, so he asserts, can absolutely set one or two weeks from the day of birth as the maximum limit within which baptism must in every case be conferred.[6]

When it is determined that one's own pastor cannot be reached conveniently and without delay, then any local pastor whatsoever may within his parish solemnly baptize the *peregrinus*. Thus, through the presence of the excusing factors, pastors who previously had no competence for the lawful administration of solemn baptism in respect to the *peregrinus* now have equal rights, so that the conferring of the baptism is recognized as being governed by the principle "*Locus regit actum.*"

Unless the circumstances of inconvenience and delay are present, however, any pastor who, apart from a canonically authorized permission.[7] confers solemn baptism upon a *peregrinus* acts unlawfully. The Second Plenary Council of Baltimore (1866) condemned as a very serious abuse the practice of priests who accepted for baptism children belonging to another parish to which they could easily be brought without delay.[8]

Moreover, since the Code is so strict in requiring that a *peregrinus* return to his own parish when this is possible for him, it may here be noted that *a fortiori* it would frown upon any practice whereby a child which is born in its own parish would be transported without cause or necessity to another parish to be later baptized there on the score that it would be difficult to return the child to its proper parish.[9]

Frequently the pastor will discover that *peregrini* who fall within his potential competence for baptism are children who are born in hospitals or maternity houses located within the limits of his parochial territory. It is frequently asked who

[6] Woywod, "How soon must newly born infants be taken to church for baptism?"—*Homiletic and Pastoral Review,* XXV (1925), 652.

[7] Canons 738, § 1, and 744 point to this possible alternative.

[8] *Acta et Decreta,* n. 227.

[9] De baptismo in paroecia aliena"—*Ius Pontificium,* I-II (1921-1922), 109.

has the right to baptize such children? Certainly the children's own pastor cannot come into an outside parish and baptize them lawfully unless he has received permission from the local pastor or Ordinary.[10] True it is that the pastor of the children's domicile or quasi-domicile retains his right over these *peregrini,* but it is a right which cannot be exercised immediately and which will vanish through an undue delay of their baptism. In those instances wherein the mother and child are to be in the hospital for several weeks, or even over ten days, and the child cannot be taken to his proper pastor, then the pastor in whose territory the institution is situated has the right lawfully to administer solemn baptism. In fact, if he possesses this right and if the child, because of distance or other reasons, cannot be brought to his parochial church without grave inconvenience or danger, the local pastor may baptize the child in any other church or public oratory within the confines of his parish, even though such church or public oratory does not possess a baptismal font.[11] Indeed, the Ordinary can permit him to baptize the child solemnly in the hospital chapel or in some other fitting place, in an extraordinary case when there is a just and reasonable cause for so acting.[12]

If the child were baptized privately in the hospital because it appeared to be in danger of death, it appears that the pastor of the territory in which the hospital is situated does not in view of this fact acquire the right to supply the ceremonies. But if such a child recuperated enough to be brought to the parish church of the territory in which the hospital lies, though not to its own proper church, and if there is still danger that it may die before it can be brought to its own pastor, or if it will have to remain in the hospital a long time, then the pastor of the hospital could supply the ceremonies. Though these ceremonies are certainly not necessary for salvation, and hence can be delayed much longer than baptism itself, yet the Church does desire that they be supplied after private baptism. When

[10] Canon 739.

[11] Canon 775.

[12] Canon 776, § 2, 2° and § 2.

the necessity of a very long delay or the danger of death is present, the rights of the proper pastor should yield in this matter also to the good of the child to be derived from the ceremonies.[13]

In hospitals and maternity homes which have their own permanent chaplain, the question will arise as to what right he has to baptize the inmates, all of whom are *peregrini,* and whether this right can be exercised independently of the pastor of the parish in whose territory the institution is located. It must be borne in mind that before either the chaplain or the local pastor can habitually baptize in the chapel of such a place, that chapel must be known to possess the status of a church [14] or a public oratory.[15] Such a status is necessary in case the chaplain baptizes there, since only a church or public oratory may possess a baptismal font.[16] On the other hand, if the local pastor chooses to baptize there because the parish church is too far distant, such a privilege is his only in regard to churches or public oratories within the limits of his parish.[17] Any permission the Ordinary may grant him to baptize solemnly in places other than these can be given only in extraordinary circumstances and in individual cases.[18]

Mothon [19] thinks that when the Code speaks of public oratories in reference to the right to have a baptismal font it is using the term in a general way in contradistinction to private oratories, and consequently he maintains that a semi-public oratory can likewise possess a baptismal font. In this opinion he appears to be alone among the authors, and certainly the

[13] *AER,* LXXXVII (1932), 306-307.

[14] Canon 1161.

[15] Canon 1188, § 2, 1°.

[16] Canon 773. Proprius baptismi sollemnis administrandi locus est baptisterium in ecclesia vel oratorio publico.

[17] Canon 775.

[18] Canon 776, § 1, 2°; S. C. de Sacr., "De facultate baptismi domi conferendi extra mortis periculum," 22 iul. 1925—*AAS,* XVII (1925), 452.

[19] *Institutions canoniques* (3 vols., Paris: Desclée, de Brouwer & Cie, 1922–1924), II, art. 1696 and 1698.

language of the Code gives no warrant for such a deduction.[20]

Ordinarily the chaplain of an institution is not a pastor. However, if one of the exempt religious orders should establish a hospital, this would be exempt from the local parish priest.[21] Even then the Ordinary could put some restrictive conditions upon the religious, as to the sacred ministry, when granting permission for the establishment. In those cases wherein the institution is not entrusted to religious, and it possesses a church or public oratory, the chaplain is to be compared to the rectors of churches.[22]

But since the Code does not clearly define the rights and duties of chaplains attached to churches or public oratories of non-exempt institutions the extent of their authority must be determined from the diocesan statutes or the letter of appointment sent them by the bishop. In the following three cases of possible modes of appointment it will be shown how the chaplain can be permitted to baptize solemnly in the institution without infringing upon the rights of the local pastor.

First, the chaplain could be appointed "*simpliciter*", i.e., without the specification of any particular powers to be enjoyed by virtue of being chaplain, but with the determination at the same time that he is constituted as a *vicarius cooperator ad hoc* of the pastor of the parish in which the hospital is located. In this instance he does not trespass upon the pastor's right to baptize also, but he merely acquires a right for himself. Under such circumstances he could baptize exclusively in the chapel of the institution, and it would not be necessary for the infants to be taken to the local parish church.[23]

[20] Blat, *Commentarium*, Lib. III, pars. I, n. 65; Feldhaus, *Oratories*, The Catholic University of America Canon Law Studies, n. 42 (Washington, D. C.: The Catholic University of America, 1927), p. 116; Koudelka, *Pastors, Their Rights and Duties according to the New Code of Canon Law*, The Catholic University of America Canon Law Studies, n. 11 (Washington, D. C.: The Catholic University of America, 1921), p. 76; Augustine, *Commentary*, IV, 88; Merkelbach, *Summa Theologiae Moralis*, III, n. 170; Aertnys-Damen, *Theologia Moralis*, II, n. 78; Ayrinhac, *Legislation on the Sacraments*, p. 58.

[21] Canon 497, § 2 and § 3.

[22] Canons 479-486.

[23] Canon 775.

Secondly, it is possible for the Ordinary, for a just and grave cause, to withdraw these charitable institutions from the jurisdiction of the local pastor.[24] Then he can constitute them parishes in themselves and appoint the chaplain to them as a pastor *pleno iure*. The chaplain in this case has parochial jurisdiction over all those who reside in the institution. His right as to the patients who are only temporarily there should be defined by diocesan regulations. Even if this is not done by statute, he would still have the right to baptize them as *peregrini*, when they could not return to their own pastor conveniently and without delay.[25] At any rate no other priest could solemnly baptize within such an institution without the chaplain's permission.

Thirdly, the Ordinary can simply appoint the chaplain with full pastoral power. This is not as satisfactory an arrangement as the preceding method, for the chaplain would not be a pastor, exercising the pastoral functions in his own name, but a delegate of the Ordinary with full pastoral powers. Since the ordinary appointment as chaplain does not of itself carry with it full pastoral power, this type of chaplain must possess definite proof of such a grant of jurisdiction in his document of appointment.[26] For though his pastoral jurisdiction would be attached to his office as chaplain, yet it would be delegated and not ordinary jurisdiction. Ordinary jurisdiction is attached to an office *ipso iure*,[27] while the jurisdiction which would be attached in this instance would not be *a iure* but *ab homine*. Such a chaplain, therefore, acts as a delegate of the Ordinary; he may be removed at will; his rights may be curtailed or withdrawn by a simple revocation.

[24] Canon 464, § 2. Potest Episcopus iusta et gravi de causa religiosas familias et pias domos, quae in paroeciae territorio sint et a iure non exemptae, a parochi cura subducere.

[25] Canon 738, § 2.

[26] Canon 200, § 2. Ei, qui delegatum se asserit, incumbit onus probandae delegationis.

[27] Canon 197, § 1.

As a closing remark, in reference to the chaplain's authority, it may be observed that even if he has no parochial jurisdiction whatsoever, and hence no right to administer baptism solemnly within the institution, yet if solemn baptism is conferred in that chapel by or with the permission of the pastor in whose territory the institution is located, the priest performing the ceremony should feel bound by courtesy not to act without first speaking to the chaplain, if possible. This is only right, since by his very position he has been made responsible for the religious rites and ceremonies performed within the hospital.[28]

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[28] Woywod, "Baptism in Catholic hospital"—*Homiletic and Pastoral Review,* XXIX (1929), 535; C. Augustine, O.S.B., "Hospitals—Their Chaplains, Confessors, Pastors,"—*AER,* LXVI (1922), 185-192; "Jurisdiction in charity institutions"—*AER,* LXXVI (1927), 94-95; "Baptism in a hospital"—LXII (1920), 74-75 and 315-318. The question of a chaplain's rights has been discussed frequently in Catholic periodicals, but very few worthwhile solutions have been advanced.

Cases and Studies

THE TEST OF CATHOLICITY UNDER CANON 1099

There is no canon in the entire Code which presents greater possibilities of varied application than the intricate canon 1099. In a particular manner this canon should be of interest in our own country. Due to the non-Catholic environment and to the steadily rising number of mixed marriages here, the practical application of this canon is bound to grow in importance.

In surveying the scope of Canon 1099, one must give strict attention to its wording. The canons which precede it in the chapter of the Code to which it belongs explain the canonical form of marriage. This canon enumerates very explicitly who are held to observe the form of marriage. It states that all who were baptized in the Catholic Church, all who were converted to the Catholic Church from heresy or schism, even though they later fall away—all these are held to the canonical form of marriage as set forth in canon 1094. It goes on to say that all those baptized in the Catholic Church or eevr converted to it are held even though they marry non-Catholics, and that Orientals are held to the form when they contract with members of the Latin Church. In a word, whoever was a member of the Catholic Church by baptism or by conversion even for one instant in his life is bound to observe the canonical form of marriage. All these are included in numbers one, two, three of paragraph one of canon 1099.

The second paragraph of the same canon brings one face to face with difficulties. It prescribes that non-Catholics, baptized or non-baptized, are not held to the canonical form of marriage as long as they marry amongst themselves. This statement is clear and is a simple application of what was stated above. But it goes on to say that there are others who are also excused from the form of marriage: namely, all born of non-Catholics, even though baptized in the Catholic Church, who from childhood grew up in heresy, or in schism, or in infidelity or without any religion. These are not held to the canonical form of marriage if they contract marriage

with non-Catholics. It is in this part of the canon that the difficulty lies. It is a startling exception to the general principle set forth in the first paragraph of the canon.

Before one attempts to apply this canon, he must be aware of its general tenor and of its historical setting. The spirit of the canon must be deduced from this double source. This canon constitutes in all its parts an exception to century-sanctioned juridical principles. It is almost an anomaly in law. In Canon 87 and in law treatises one learns that by Divine Right all baptized are subject to the Church and are bound by the laws of the Church unless the Spouse of Christ releases them.[1] The canon in question is one of those releases. The canon releases all those baptized persons who were not baptized in the Catholic Church, but goes still further and also releases some who were baptized in the Church! Being thus an exception and doubly an exception, under Canon 19 the interpretation of this canon and its application must be rather restricted; it should be strictly interpreted and not applied unless the conditions laid down in the law are absolutely fulfilled.

An understanding of the extent of the canon's release depends in large measure on a knowledge of its historical background. The legal complications of the obligation to observe the canonical form of marriage began with the Decree, *Tametsi*,[2] of the Council of Trent. This Decree bound all baptized persons to observe the form of marriage as set forth by the Fathers of the Council of Trent. In its extent, it was the ideal fulfillment of the juridical principle that all baptized fall under the jurisdiction of the Church. Had it been territorially universal, it would have had serious repercussions in a world already torn by schism and heresy. Many marriages would have been invalid due sometimes to the conscious and sometimes to the inculpable negligence of the baptized. A means of escape was offered in the Decree itself to those who were not in union with the Church and even to those who, though in union, were not intimately connected with the center of Catholic discipline and authority because of conditions beyond human control. The Decree was binding only thirty days after it was promulgated and this promulgation was required as a condition precedent in even the smallest ec-

[1] Cf. McCloskey, "Post-Code Opinions on the Obligation of Heretics to Observe Ecclesiastical Laws"—THE JURIST, III (1943), 480, 481.

[2] Conc. Trident., Sess. XXIV, *de ref. matrim.*, c. 1.

clesiastical territorial divisions (individual parishes). Under the doctrines developed by practical problems, it was held that the Decree could lose its binding force by a protracted period of non-application just as it could acquire binding force by a long period of official application without the prescribed form of promulgation.[3] If one party to the marriage was free from its observance, he communicated that exemption to the other party and thus the marriage was not subject to the Decree, *Tametsi*.[4] To remove a constant source of worry and confusion, Pope Benedict XIV on November 4, 1741, issued his Benedictine Declaration whereby all non-Catholics and all mixed marriages in Holland were made exempt from the form of the Decree, *Tametsi*.[5] This privilege was later extended to the regions where non-Catholics were present in preponderant numbers. It followed therefore, that even though the canonical form was all-embracing in word and in intent, numerous exemptions lessened the rigor of the law to a great extent. The law and its interpretations are marked by the solicitude of the Church for her children. The Church lightened the yoke when its burden threatened to be insupportable.

In the jurisprudence handed down on the Decree, *Tametsi*, there is to be found something very pertinent to the status of those baptized in the Catholic Church but not brought up or educated as Catholics. In 1859 the Sacred Congregation of the Holy Office issued a response.[6] It decided that the Decree, *Tametsi*, should not be applied in Holland, under the Benedictine Declaration, to the marriages of those people baptized in the Catholic Church but from earliest childhood (before the age of seven) educated in heresy, or professing heresy without ever having professed actively their Catholic Faith. The same was determined for those who had been educated by heretics even though they had not been too active in heretical sects. In the same legal position were placed all apostates; all who as children had become members of heretical sects; all who were baptized in heresy and who had grown up without any religion.

[3] Wernz, *Ius Decretalium, Ius Matrimoniale* (Romae, 1894), n. 160.

[4] Wernz, *op. cit.*, nn. 168, 173.

[5] *Codicis Iuris Canonici Fontes*, n. 3527; cf. Benedict XIV, *De Synodo Dioecesana* (Parmae, 1764), lib. VI, cap. VI; Wernz, *op. cit.*, n. 171; Heneghan—The Jurist, III (1943), 322.

[6] *Fontes*, n. 950.

By this response of the Sacred Congregation the rigor of the Decree, *Tametsi,* was again tempered.

The next step in canonical legislation on the form of marriage came with the publication of the Decree of Pius X, *Ne temere.* This Decree prescribed that all baptized in the Catholic Church or once converted to it, were bound forever to the observance of the canonical form of marriage. It abolished the favor of the Benedictine Declaration and all its extensions.[7] As for baptized non-Catholics, the Decree stated that these were in no way held to the observance of the canonical form as long as they contracted marriage amongst themselves. Nothing could be simpler or clearer. Once a member of the Catholic Church one was held to obey the canonical form of marriage; otherwise there was no obligation.[8]

The Decree of Pius X was a forerunner of the law of the Code. However, when the Code appeared it presented to the Catholic world a happy combination of the Decree, *Ne temere,* and the response of 1859. Whereas the Decree, *Ne temere,* disregarded those who had been baptized in the Catholic Church but not educated as Catholics, the Code specifically makes provisions for them in canon 1099, § 2. Part one of the canon is the Decree, *Ne temere,* telling us that all baptized in the Catholic Church or converted to it are held for all time and under all circumstances to the observance of the canonical form of marriage. Part two reminds us of the exemption granted by the response of 1859 to those baptized in the Catholic Church but not educated as Catholics. The Code therefore inserts the jurisprudence of the response of 1859 but with a slight change. It will exempt from the canonical form even the baptized in the Catholic Church on the condition that they be born of non-Catholics and that they were educated from infancy in heresy, schism or infidelity

[7] S.C.S. decr. *Ne temere,* 2 aug. 1907—*Fontes,* n. 4340. The Apostolic Letter *Provida* (18 ian. 1906—*Fontes,* n. 670) continued in force after the issuance of the Decree, *Ne temere,* in Germany and was later extended to Hungary (23 febr. 1909) in a resolution of the Sacred Congregation of the Sacraments—cf. Wernz-Vidal, *Ius Canonicum,* V, *Ius Matrimoniale* (2. ed., Romae, 1928), 649, footnote 83; Boyle, *The Juridic Effects of Moral Certitude on Pre-Nuptial Guarantees,* The Catholic University of America, Canon Law Studies, n. 150 (Washington, D. C., 1942), pp. 47, 48.

[8] The Sacred Congregation of the Holy Office indicated that recourse was required to the Holy See in each case where the marriage of a child born of non-Catholics was involved, if the child had been baptized a Catholic but reared from infancy outside the Church (March 31, 1911)—*AAS,* III (1911), 163.

or grew up without any religion whatsoever. There must be a total lack of Catholic practice either because of positive profession of contrary doctrine or because of negation of religion.[9]

It is significant to note the fluctuations in the discipline of the Church as regards the obligation of the baptized to observe the form of marriage. The Decree, *Tametsi,* was strict in its tenor yet greatly lessened in rigor by the number of exceptions. Then came a reversal of policy as to persons baptized Catholics in the clear, precise wording of the Decree, *Ne temere.* The Code follows the clarity of the Decree, *Ne temere,* but not without incorporating an exemption from the response of 1859, exacting the fulfillment of two conditions—one of old standing (the baptized in the Catholic Church shall not have been educated as Catholics) and one of recent origin (the Catholic shall have been born of non-Catholics). The exception was accorded, then withdrawn, and once again accorded but with less liberality. It is also important to restate the characteristic of the canon: it is an exception to the general law, to general juridical principles.

In the matter of interpreting the canon, there are many who are tempted to see in the wording of the canon an effort on the part of the Church to meet present-day conditions of religious apathy and indifference. For them the slightest semblance of a reason releases the baptized Catholic born of non-Catholics from the obligation of the canonical form of marriage. Some are of a mind that a complete Catholic education is required that such a one be held to the obligation of the form. This is not exact. The canon is not an " all-out " release. The wording of the canon presumes a total lack of Catholic training from the age of seven, from childhood. It presumes that the person born of non-Catholics but baptized in the Catholic Church never accepted or realized his obligation to observe the laws of the Church. If ever he did, then from that moment on he was held to abide by its laws on the form of marriage.

If there be any Catholic education in his life, then the obligation of the form is induced for him. To what degree must that Catho-

[9] The Pontifical Commission for the Interpretation of the Code has replied that the children of a mixed marriage are exempt from the form even though baptized Catholics, if they are reared from infancy outside the Church (July 20, 1929, ad II)—*AAS,* XXI (1929), 573; so also children of apostates (February 17, 1930)—*AAS,* XXII (1930), 195; and this interpretation was declarative (July 25, 1931—*AAS,* XXIII (1931), 388.

lic education go? It would seem that those are obliged to the canonical form who have been baptized in the Catholic Church or converted to it and have personally accepted their Catholic affiliation. It is this element of personal acceptance of the Catholic Religion after Catholic baptism which will determine the juridical obligation to the form or otherwise. It is in the measurement of this element that the difficulties will arise and have already arisen amongst authors.

There seems to be unanimity as to the binding force of the canonical form on all those who have made personal profession of Catholicism either by abjuring their heretical views or by receiving a Sacrament. Thus the convert who abjures heresy and embraces the Faith is held to the canonical form even though his stay in the Church be of the briefest duration. If a child makes his first Communion or goes to confession in preparation for Communion, there is no one who will deny his obligation to the form. Authors seem to sense the personal element in these acts. There is something free, personal, voluntary in them.

The disputed territory begins with tacit profession, with tacit acceptance of the Catholic Faith: personal acceptance as deduced from acts which do not seemingly involve Catholicism in an exclusive way or in too personal a manner. However, one should concede that tacit profession and acceptance does suffice. The children of converts are presumed to be converted to the Faith even though baptized outside the Church and educated in heresy if, following their parents' conversion, they grow up in the Catholic Faith without rejecting it after attaining the use of reason. This is admitted as a solid presumption in law if the children do nothing contrary to their Catholic education from the age of seven until fourteen. During this period there may never have been any abjuration made or Sacrament received. Their acceptance is, therefore, a personal though tacit acceptance.[10]

Tacit profession and acceptance of Catholicism is based mainly upon such facts as attendance at Mass from time to time; recitation of prayers; the use of Catholic practices and devotions, etc. All these acts might be performed by certain persons without the slightest intent on their part of professing Catholicism; on the part of others,

[10] Wernz-Vidal, *op. cit.*, p. 648; Gasparri, *De Matrimonio* (Romae, 1932), II, nn. 1020, 1024.

these practices could be the external manifestation of Catholic convictions. The note of personal acceptance of Catholicism would have to be present in those actions to justify the use of them as a basis for holding the individual to the canonical form of marriage. It is in this sense that the suggestions of authors should be interpreted. They give us criteria whereby to judge this personal element: the conviction that one is a Catholic coupled with at least a minimum of Catholic worship and practice; a protracted attendance at catechism classes (say for four years) especially in preparation for a Sacrament which actually was never received; one's claim to Catholic affiliation and acknowledgment of that claim by others; the absence of all heretical training or practice; opposition to heretical training whilst adhering to a minimum of Catholic practice, etc. These incidents in one's life might be trifles but they are of actual value because of what they denote: namely, personal, interior acceptance of the Catholic Faith after Catholic baptism. A preponderance of authors favors and sustains the above opinion.[11]

Tacit acceptance of Catholicism and the consequent obligation to the canonical form of marriage is not rare. In city parishes where children are often poorly supervised in their religious education and instruction; where they frequently practice their religion so unfaithfully as to Mass and the Sacraments; where they remain unknown and unchecked by the parish clergy; it will frequently happen that some who are Catholics by baptism and by desultory, minimal Catholic practice, but who possess unshaken conviction of their Catholic affiliation, will arrive at the age of marriage without having made their first Communion or without having even once received the Sacrament of Penance! Yet they have probably attended a parochial school for a year or more; were always known as Catholics; attended Mass at times; were visited by the priest on the census or at least expected his visit; but left to themselves lacked interest in catechism and thus were never properly prepared for the Sacraments. In such cases there is no complete lack of religious training; there is no training in heresy, schism or in infidelity; there is no denial of Catholicism. There is in these cases a minimum of Catholic education with a personal acceptance of Catholicism.

[11] Cf. Oesterle in *Apollinaris*, XII (1939), 103-109; Beijersbergen in *Periodica*, XXX (1941), 46-51; the latter cites Oesterle, Triebs, Cappello, Vromant, Linneborn, Wernz-Vidal and Vermeersch.

Such people would be surprised to learn that they were not Catholics. It would seem beyond doubt that their personal acceptance of Catholicism as deduced from their actions would be sufficient to hold them to the jurisdiction of the Church and to its laws on the form of marriage.

Again this tacit profession and acceptance of Catholicism in a personal manner finds itself frequently verified in the case of National Church affiliates who return to the Catholic Church. Such children who come back to the Church with their parents may grow up and never receive a Sacrament in the Church until after the age of fourteen. They attend Catholic schools, attend Mass, perform acts of Catholic worship. Suppose such a child should fall away from the Catholic Church around the age of twelve or thirteen after having been in the Church for some years without having received a Sacrament. Should we exempt him from the obligation of the form? It hardly seems possible to give him the exemption. Nevertheless, his obligation to the form would be based upon his personal acceptance of Catholicism as expressed in his actions.

Therefore, given the nature of canon 1099, namely, its being a double exception to juridical principles, requiring to be strictly interpreted; granted that the historical basis of the canon shows a tendency on the part of the Church to be liberal to those who have fallen away from her bosom, a liberality tempered with conditions that seemingly exact complete ignorance of Catholicism in those exempt, it would seem warranted to conclude that not only formal and express acceptance of Catholicism binds one to the canonical form but also tacit, personal acceptance. The latter can well be made the basis of a proper process to determine the extent of this obligation to the canonical form of marriage.

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AN OUTLINE OF THE HISTORICAL EVOLUTION OF THE PENAL LAW OF THE CHURCH

The preservation of Christian unity in faith and morals is guaranteed by the legislative power of the Holy See as well as by Papal Infallibility. The exercise of the legislative power implies the use of sanctions or penal laws. Consequently, examples of penal laws

may be found in Apostolic times, as well as the effectual use of coercive jurisdiction. In accordance with the words of our Lord,[1] the primitive Church, as various epistles of St. Paul attest irrefutably, established and applied the penalty of exclusion (or excommunication) from the community of the faithful.[2] This exclusion from the community,[3] which of itself was permanent, although amendment and readmission were sanctioned,[4] was imposed for grievous delinquencies, such as fornication, extortion, idolatry,[5] disobedience,[6] so that thus the whole community might be preserved from contamination,[7] that the culprit be punished for the crime,[8] that he amend,[9] and that he be saved in the day of our Lord Jesus Christ.[10]

During the subsequent three centuries there are no collections of penal law in evidence. However, many penalties are found scattered in various documents.[11] It is clear from these sources that punishable crimes were grave and external. Origen declares, " propter hoc enim et in ecclesiis consuetudo tenuit, ut qui manifesti sunt in magnis delictis, ejiciantur ab oratione communi ".[12] The three capital crimes were apostasy from the faith and idolatry, homicide

[1] " But if thy brother sin against thee, go and show him his fault between thee and him alone. If he listen to thee, thou hast won thy brother. And if he do not listen to thee, take with thee one or two more so that on the word of two or three witnesses every word may be confirmed. And if he refuse to hear them, appeal to the Church, but if he refuse to hear even the Church, let him be to thee as the heathen and publican."—Matt. xviii, 15 ff.

[2] ". . . that he who has done this deed might be put away from your midst." —I Cor. v, 2.

[3] I Cor. v, 3: II Cor. ii, 6, 12.

[4] II Cor. ii, 7, 8.

[5] I Cor. v, 1, 2, 10-13.

[6] II Thess. iii, 14.

[7] I Cor. v, 6.

[8] I Cor. v, 1-5.

[9] II Thess. ii, 14.

[10] I Cor. v, 5.

[11] Cf. Tertullian (after 222), *De poenitentia,* Migne, *Patres Latini* (*MPL*) I, col. 1240 ff.; *De pudicitia,* MPL, II col. 980 ff.; Origen (about 185-255)—cf. Kirch, *Enchiridion fontium historiae ecclesiasticae antiquae* (Friburgi Brisgoviae, 1914); St. Cyprian (+ 258), *De lapsis* (251)—*MPL,* IV, col. 468 ff.

[12] Origen, *Commentarium in Matt., c.* 89—Migne, *Patres Graeci,* (*MPG*), XIII, col. 740.

and fornication.[13] The chief penalty inflicted was exclusion from the Christian community. When there was question of recidivists (i.e., those who repeat the same crime) or more grievous delicts perpetual exclusion from the community was decreed.[14] Reconciliation of other lapsed delinquents, however, remained possible provided very severe juridical conditions were observed, such as public penance, prayer, fasts.[15] From the third century on not only excommunication was applied against delinquent clergymen, but deposition and privation of revenues as well. The bishop alone, or acting with his priests, was the competent authority for inflicting penalties.

In the fourth and fifth century, under the Christian Emperors of Rome, when the Church became emancipated and the Catholic Faith was recognized as the religion of the State, a period of intensive propagation and internal evolution set in with a perfectly developed juridico-social order. A comprehensive outline of the ecclesiastical penal system is clearly evidenced in the writings of the Fathers of the Church and in the various synodal canons, where ecclesiastical crimes and penalties to be imposed upon individual delinquents are more accurately determined. Moreover, the procedure to be observed in the infliction of penalties and the reconciliation of delinquents, especially with regard to public penance, is defined to some extent.[16]

The first traces of distinct collections of penal and penitential canons may be found in three canonical letters written by St. Basil of Neocaesarea († 397) concerning ecclesiastical crimes and public penances.[17] The writings of St. Gregory of Nyssa († about 394) also contain a number of these penal canons.[18] But the penal canons enacted at the earliest synods were not arranged in an orderly and systematic manner into an authentic form, and are found scattered in divers chronological collections together with various disciplinary canons.[19]

[13] Tertullian, *De pudicitia*, c. 12—*MPL*, II, 1002.

[14] Michiels, *De delictis et poenis* (Lublin, Polonia, 1934), p. 32.

[15] Michiels, *l. c.*

[16] Michiels, *op. cit.*, p. 33.

[17] St. Basil, *Epistolae Canonicae*, 188, 199, 217—*MPG*, vol. XXXII.

[18] Cf. *MPG*, Vol. XLVI.

[19] Cf. Van Hove, *Prolegomena* (Mecliniae-Romae, 1928), p. 92 ff., n. 101 ff., n. 113 ff., etc.

The nature of crime is clearly determined. Every crime is a sin, but not every sin is a crime, but only a grave sin, deserving of accusation and condemnation in the external forum.[20] Thus far there is no definite collection of ecclesiastical crimes; however, besides the capital delinquencies mentioned before, the Fathers of the Church and different councils enumerate many more, such as theft, fraud, sacrilege, usury, simony, false accusation, etc.[21]

Gradually, other punishments are added to excommunication, such as minor penalties, privation of Holy Communion or other spiritual rights, prohibition of entering a Church, etc.[22] Clergymen, moreover, were punished in many ways, for example, by reduction to the lay state, deposition, degradation, disqualification for attaining higher offices, transfer, suspension from office or revenues, physical chastisement, and ostracism. Generally these penalties are of a vindicative character. Public penances are observed to a greater extent and determined more accurately.[23]

As a rule penal authority is exercised by bishops, with the aid of priests and deacons. The Christian Emperors not only recognize the episcopal power over ecclesiastical delicts of laymen and the clergy, but offer the assistance of the secular arm in punishing them, and impose civil sanctions upon certain crimes against religion, such as heresy, idolatry, simony, etc., and even upon transgressions of the clergy.[24].

During the Merovingran period the evolution of the penal law of the Church has slight bearing upon the intrinsic nature of crime and penalty, and the juridical principles relative thereto. The number of penalties, however, is augmented considerably.

Punishments for other crimes than those already indicated above are decreed by the Visigothic Church and by the Franks in the VIth and VIIth century, as for example, for the oppression of the poor, and the destruction or the confiscation of Church property. Besides spiritual penalties which were imposed upon laymen formerly, there now appear many temporal punishments, such as chastisement,

[20] Cf. St. Augustine, *Tract. in Joan. Evangel.*, XLI, c. 10; see also Gratian's *Decretum*, c. 1, D. LXXXI.

[21] C. 1, D. LXXXI.

[22] Michiels, *l. c.*

[23] Michiels, *op. cit.*, p. 34.

[24] Michiels, *l. c.*

imprisonment, exile, confiscation of property, pecuniary fines, loss of secular offices, etc. This was due partly to the influence of the Germanic laws, and partly to the desire to modify the uncivilized customs of the people. The penalties remain essentially vindicative; gradually, however, the corrective character of certain spiritual punishments appears in evidence. Furthermore, the first traces of automatic censures, namely, those incurred *ipso facto* (*poenae latae sententiae*) are found in the Visigothic Church. New penalties are inflicted against delinquent clergymen, such as public penances, sojourn in a determined convent, etc.[25]

From the VIth century the system of penances takes on an altogether new form, for, to penances accepted willingly, are added others of a coactive nature. The power of the Church regarding merely ecclesiastical crimes is fully recognized by the civil authority of the Franks and Visigoths. Moreover the latter consider many ecclesiastical crimes as militating against the civil order, and hence punish them accordingly.[26]

From the end of the VIIth century to Gratian's Decree (XIIth century), the penal system of the Church evolves to a considerable extent, not only because the number of crimes punishable by ecclesiastical law increases, but because penal principles, hitherto but slightly attended to, receive a more precise specification.

Looking first at crimes in themselves, one observes that strictly ecclesiastical delinquencies are affected by the coactive power; namely, those crimes directly opposed to the authority and hierarchical rights of the Church and the clergy, as for example, violation of the judicial power of the Church, heresy, simony, etc. Spiritual penalties for individual crimes become more numerous, such as minor excommunication, partial suspension, local and personal interdict, prohibition of ecclesiastical burial, disqualification for obtaining pontifical favors; especially are temporal penalties augmented and more frequently applied. In the wake of the fusion of religious and civil life, the Church extends her jurisdiction to numerous so-called mixed offences, which by their very nature remain within the competency of both fora, ecclesiastical and civil, and to an appreciable number of merely civil crimes as well. For the execution of ecclesiastical sentences the civil authority quite generously proffers its support.

[25] Michiels, *l. c.*

[26] Michiels, *op. cit.*, p. 35.

Relative to principles of penal law, the difference between vindicative and medicinal penalties is determined more clearly. Up to the VIIIth century censures *ferendae sententiae* were applied in nearly all cases, but henceforth censures *latae sententiae* are more and more in evidence.[27] Public penances reach their culminating development during this period, then gradually decline, and finally disappear altogether in the XIIth century.[28] Then, too, the principles governing the remission of punishments are more accurately defined. About the IXth century the public character of crimes and punishment is pointed out, and principles deduced therefrom are applied to the procedure employed in the prosecution and punishment of crimes. All these various principles are not proposed in a systematic order, but may be gleaned from the various provisions scattered throughout the sources of penal law.

Prominent among the sources of ecclesiastical penal law of this period are the Penitential Books, which, in a certain sense, may be styled real penal codes, containing penances, both public and private, to be inflicted for various crimes. Some of these collections date from the VIth century; the majority, however, are composed between the VIIth and IXth centuries. Some of the more outstanding ones are the following. In the middle of the Vth century the *Canons of St. Patrick* appeared in Ireland.[29] Others followed in the next century, for example, those of St. Finian († 589).[30] The Penitential Books of St. David of Menevia († 544)[31] and those of Gildas († 583)[32] belong to this period. They serve as sources for Columban's († 615) *Liber de Poenitentia* which spreads throughout the rest of Europe. During the following four centuries the *Poenitentiale Theodori*, Archbishop of Canterbury († 690),[33] is widely in use, as is also the *Excarpsus* of St. Bede († 735).[34] The Penitential

[27] Michiels, *l. c.*

[28] Michiels, *op. cit.*, p. 36.

[29] Van Hove, *op. cit.*, n. 136.

[30] H. Schmitz, *Die Bussbücher und die Bussdisciplin der Kirche*, I, (Mainz, 1883), pp. 497-499.

[31] H. Schmitz, *op. cit.*, pp. 490-493.

[32] H. Schmitz, *op. cit.*, pp. 494-497.

[33] H. Schmitz, *op. cit.*, pp. 510-550.

[34] H. Schmitz, *op. cit.*, pp. 550-564.

Book of Egbert († 767),[35] Archbishop of York, is afterwards joined with Bede's collection to form a single work *De remediis peccatorum.* In France one finds the *Liber de Poenitentia* of Columban of Bangor († 615),[36] and the *Excarpsus* of Cummean.[37] An important penitential book is that composed by Halitgar, Bishop of Cambrai, who was appointed by Ebbo of Rheims in 830 to draw up a new edition.[38] The Fifth Book of this latter collection is entitled: *Poenitentiale Romanum de scrinio Romanae Ecclesiae assumptum.*[39] In Germany, another noteworthy production is that of Hrabanus Maurus, Bishop of Mayence (847-855).[40]

The purpose of these penitential collections was to maintain uniformity among confessors in dealing with penitents. Many of the penitential books, however, never obtained recognition from the public authority of the Church; some were even proscribed by various councils. Others were favorably received in different countries.[41]

Penal canons are scattered throughout other juridical sources of this period,[42] namely, in the following collections: Dionysio-Hadriana,[43] Hispana Isidoriana,[44] the Capitularies of the Frankish Kings,[45] the Pseudo-Isidorian Decretals,[46] Regino of Prüm's,[47] two books, *De Synodalibus Causis et Disciplinis Ecclesiasticis* and the

[35] H. Schmitz, *op. cit.*, pp. 565-587.

[36] H. Schmitz, *op. cit.*, pp. 588-602.

[37] H. Schmitz, *op. cit.*, pp. 602-645.

[38] H. Schmitz, *op. cit.*, p. 121.

[39] *MPL*, CV, pp. 651-710.

[40] *MPL*, CXII, pp. 1397-1424; cf. H. Schmitz, *op. cit.*, pp. 733-736.

[41] Michiels, *op. cit.*, p. 37.

[42] Cf. Van Hove, *op. cit.*, n. 157 ff., n. 167 ff.

[43] *MPL*, LXVII, pp. 139-316.

[44] *MPL*, LXXXIV, pp. 93-848.

[45] Cf. *Monumenta Germaniae Historica, Legum*, Sectio II, *Capitularia Regum Francorum* (Hannoverae, 1897). Excerpts may be found in Silva-Tarouca's *Fontes historiae ecclesiasticae medii aevi*, Pars I (Rome, 1930), p. 338 ff., n. 275 ff.

[46] *MPL*, CXXX.

[47] *MPL*, CXXXII, pp. 175-455.

Decretum, of Burchard of Worms;[48] that of St. Anselm of Lucca,[49] of Cardinal Deusdedit,[50] the three collections (*Tripartita, Panormia, Decretum*) of Yvo of Chartres,[51] and the *De Misericordia et Justitia* of Alger of Liege, published about 1121.[52]

Gratian's *Decretum,* which appeared about 1140, contains a systematically arranged section embracing the penal law, but penal sanctions attached to the violation of disciplinary laws are scattered throughout the *Decretum.* The more serious crimes considered in Gratian's *Decretum* are the following. Against ecclesiastical authority: violation of the right of investiture [53]; opposition to ecclesiastical precepts [54]; against the public order: denial of the right of sanctuary [55]; violation of peace in the Church [56]; against religion: magic, divination, witchcraft,[57] simony,[58] perjury [59]; against life: homicide and the beating of clerics [60]; against morals: adultery,[61] rape,[62] violation of celibacy [63]; against honor: injury [64]; against property: theft,[65] rapine,[66] incendiarism.[67]

[48] *MPL,* CXL, pp. 537-1090.

[49] *MPL,* CXLIX, pp. 485-568; cf. Thaner's ed., (Oeniponte, Vol. I, 1906, Vol. II, 1915).

[50] Cf. Von Glanvel's ed., (Paderborn, 1905).

[51] *MPL,* CLXI, pp. 47-1041.

[52] *MPL,* CLXXX, pp. 857 ff.

[53] C. 13, C. XVII, p. 7.

[54] C. 11, C. XI, q. 3; cc. 11-13, C. XXV, q. 2.

[55] C. 10, C. XVII, q. 4.

[56] C. 30, C. XXIV, q. 1.

[57] Cc. 1, 2, 5, 9, 11-13, C. XXV, q. 2.

[58] Cc. 3, 7, 8, 22, C. I, q. 1.

[59] Cc. 2-4, C. XXII, q. 5.

[60] Cc. 23-29, C. XVII, q. 4; c. 30, C. XXIII, q. 4; c. 22, C. XXIV, q. 3; c. 7., C. XXXIII, q. 2.

[61] Cc. 6, 28, C. XXVII, q. 1; c. 2, C. XXXII, q. 1; c. 4, C. XXXII, q. 4.

[62] Cc. 33, 34, C. XXVII, q. 2; cc. 1-6, C. XXXVI, q. 2.

[63] Cc. 6, 11, 12, 15, 17, etc., C. XXVII, q. 1.

[64] C. 8, C. VI, q. 1.

[65] C. 9, C. III, q. 5; cc. 46, 47, C. XII, q. 2; c. 11, C. XIII, q. 2; c. 13, CXIV, q. 5.

[66] C. 9, C. III, q. 5; cc. 46, C. XII, q. 2; c. 13, C. XIV, q. 5.

[67] Cc. 31, 32, C. XXIII, q. 8.

As a consequence of the practically universal recognition of the pontifical supremacy in the XIIIth and XIVth centuries, the penal law of the Church becomes more comprehensive, that is, it extends to a greater number of violations, but essentially nothing is changed.

In reference to crimes, Pope Innocent III expresses a universal principle: " Ad officium nostrum spectat de quocumque mortali peccato corripere quemlibet christianum ".[68] In accordance with this principle not only essentially ecclesiastical crimes are punished by canonical penalties, such as heresy, apostasy, simony, sacrilege, violations of ecclesiastical liberties and immunities, but nearly all external acts infringing the moral Christian order. To so-called mixed crimes, v.g., homicide, theft, perjury, rape, duelling, etc., the principle is applied that both the Church and the State are equally competent, but the *right of prevention* is admitted, that is, the authority that issues a legitimate summons first to the defendant becomes competent to settle the case proposed.

Turning to individual punishments, one notices that spiritual penalties, especially the interdict, and temporal ones, are now fully evolved and more accurately determined. Disciplinary punishments to be imposed upon delinquent clergymen are developed to a greater extent, for example, degradation, insofar as it is considered distinct from deposition, suspensions, and partial deprivation of rights.[69] Furthermore, the constitutive elements of crime are defined with closer precision, especially as regards the subjective element or juridical fault, attenuating circumstances, and the causes extinguishing culpability as well as various methods whereby a penalty incurred by a person is withdrawn.[70]

During the third decade of the XIIIth century, St. Raymund of Penyafort was directed by Gregory IX to compile the scattered decisions of the Popes and Councils. The Fifth Book of this work, called the *Decretals of Gregory IX* because the greater portion of the documents included therein were issued by him, contains all the matter pertaining to crimes and punishments. Criminal procedure is explained in the First Title; Titles II-XXXVI enumerate various crimes, although no logical or systematic order is observed. Finally,

[68] C. 13, X, *de iudiciis*, II, 1.

[69] Cf. Michiels, *op. cit.*, p. 38.

[70] Michiels, *op. cit.*, p. 39.

in Titles XXXVII-XXXIX are embodied vindicative penalties, penal remedies and censures.

About seventy years later (1298) the *Liber Sextus Decretalium* of Boniface VIII made its appearance, comprising thirteen Titles in which certain lacunae of the penal law found in the *Decretals of Gregory IX* are supplied.[71] In 1317 Clement V published another collection of Decretals, sometimes call the *Liber Septimus* (but more usually *Clementinae*), of which eleven Titles are devoted to crimes and punishments. The same matter is dealt with in Fourteen Titles of the *Extravagantes* of Pope John XXII, and in Ten Titles of the *Extravangantes Communes.*[72]

No substantial change occurs in the penal system of the Church from the XVth century to the promulgation of The Code of Canon Law. Several new crimes punishable by the canons are added, as for example, appeal as from abuse [73] and the admission of the *regium placet,*[74] abuses arising during elections of the Pope, etc. Other new penalties appear, v.g., privation of benefice. Several others fall into desuetude.

The chief source of the penal law during this period is the Council of Trent (1545-1563), which enacted canons delineating penal procedure [75] and in many decrees determined crimes and penalties. In 1627 Urban VIII promulgated the celebrated Bull "*In Coena Domini*" [76] containing excommunications for offences committed against the Roman Court and the Papal States. The *Bullarium* of Benedict XIV also enumerates many penal provisions.

On October 12, 1869 Pius IX assembled all the censures to be incurred *ipso iure* in his Constitution "*Apostolicae Sedis.*" The codi-

[71] Cf. Titles II-XI of the *Liber Sextus.*

[72] This collection contains decretals and constitutions of thirteen Popes, from Urban IV (1201-1264) to Sixtus IV (1471-1484).

[73] Appeal as from abuse: recourse made to a civil judge against a sentence that has been passed by an ecclesiastical court, in order that the former correct any abuse that may have arisen.

[74] *Regium placet*: faculty extended by civil authority to episcopal acts so that the latter may have binding force.

[75] Cf. Sess. XXIII, *de ref.*, cc. 1-8; Sess. XIV, *de ref.*, cc. 1, 4, 5; Sess. XXIV, *de ref.*, cc. 5, 20.

[76] From the XIVth century to the end of the XVIIth century the Bull "*In Coena Domini*" was usually promulgated on Holy Thursday by the Roman Pontiffs.

fication of automatic censures by Pius IX may be looked upon as a preformative step towards a uniform system of ecclesiastical penalties; for other punishments, for example, censures *ferendae sententiae,* namely, those to be imposed after the crime by canonical authority, recourse was had to the immense cumulus of ancient laws, "quarum intelligentia," as Roberti[77] declares, "sive ob ingentem numerum et diversam collocationem, sive ob successivas abrogationes et desuetudines perdifficilis vel ipsis jurisperitis evaserat."

The Code of Canon Law marks a turning point in the penal system of the Church. Doubts and uncertainties have been greatly diminished. Juridical principles are clearly set forth regarding the nature, the specification, the elements, and the perpetrator of crime, as well as the nature, the specification, the elements, and the imposition of the penalty.

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PRESUMPTION OF LEGITIMACY

Grace, a baptized Catholic, lawfully united in marriage to George, also a baptized Catholic, was unfaithful to her husband over a period of a year before his death. At his death, she married Henry, a baptized Catholic, the man with whom she had been sinning. This marriage took place in the Church on April second. George had died on March first of that year. On October tenth of the same year, a child was born. This son now desires to enter our seminary to study for the priesthood. Does he need a dispensation from the irregularity of illegitimacy?

RECTOR.

Canon 1114. Legitimi sunt filii concepti aut nati ex matrimonio valido vel putativo, nisi parentibus ob sollemnem professionem religiosam vel susceptum ordinem sacrum prohibitus tempore conceptionis fuerit usus matrimonii antea contracti.

Canon 1115, § 1. Pater is est quem iustae nuptiae demonstrant, nisi evidentibus argumentis contrarium probetur.

§ 2. Legitimi praesumuntur filii qui nati sunt saltem post sex menses a die celebrati matrimonii, vel intra decem menses a die dissolutae vitae coniugalis.

Canon 1116. Per subsequens parentum matrimonium sive verum sive putativum, sive noviter contractum sive convalidatum, etiam non consummatum, legitima efficitur proles, dummodo parentes habiles exstiterint ad matrimonium inter se contrahendum tempore conceptionis, vel praegationis, vel nativitatis.

[77] Roberti, *De Delictis et Poenis,* Vol. I (Rome, 1930), n. 9.

Canon 1117. Filii legitimati per subsequens matrimonium, ad effectus canonicos quod attinet, in omnibus aequiparantur legitimis, nisi aliud expresse cautum fuerit.

Canon 984. Sunt irregulares ex defectu: 1° Illegitimi, sive illegitimitas sit publica sive occulta, nisi fuerint legitimati vel vota sollemnia professi.

Canon 331, § 1. Ut quis idoneus habeatur [ad episcopatum], debet esse: 1° Natus ex legitimo matrimonio, non autem legitimatus etiam per subsequens matrimonium.

Canon 1075. Valide contrahere nequeunt matrimonium: 1° Qui, perdurante eodem legitimo matrimonio, adulterium inter se consummarunt et fidem sibi mutuo dederunt de matrimonio ineundo vel ipsum matrimonium, etiam per civilem tantum actum, attentarunt.

The circumstances of the marriage of Grace and Henry were indeed unusual. One supposes that the pastor who officiated was satisfied that the impediment of crime did not exist; or, if the parties had actually exchanged promises of marriage to be celebrated after the death of George, that he obtained a dispensation from the impediment.

As to the parentage of the child, the likelihood, based on what commonly occurs, is that he was conceived at some time in the first half of the month of January. Since that likelihood establishes a presumption of fact, one is justified in concluding that the child was conceived during the period of the existence of the first marriage. But, unless it can be proved at least by a summary process that Grace and George were not living together as man and wife during that time, and since it can be proved that Grace was having relations with Henry at that time, the parentage would even then be doubtful, as a matter of fact. Nevertheless, the juridical presumption would be that Grace and George were the parents. For this is the governing juridical presumption unless it can be established that Grace and George had not cohabited after December tenth of the preceding year, or other proofs can be brought to exclude the parentage of George, such as impotence. Under this presumption, the child would be the legitimate child of Grace and George. But the Code raises another presumption that would seem to indicate that the child is the legitimate child of Grace and Henry, inasmuch as he was born more than six months after their marriage. Strictly speaking, then, the juridical presumptions prescind from the normal period of gestation, and derive their origin from extraordinary situations: the farthest and the nearest date at which one could

be regarded as having cooperated in the child's conception.

It is of primary importance to note that no presumption can arise to hold the child as the legitimate offspring of the second marriage, if it is proved that Grace was pregnant at the time the second marriage was celebrated. But there is no need to invoke a presumption when one has proof.

If, therefore, it were shown that conception occurred prior to the marriage of Grace and Henry, and the parentage of George could be excluded by adequate proof, this would prove the child to be the legitimate offspring of Grace and Henry. For under Canon 1114, a child is legitimate if *born* of a marriage, even though not *conceived* in wedlock. Even after his birth, the subsequent marriage of Grace and Henry would legitimate him, since for such legitimation it suffices that the parents are *habiles* at any time during the gestation of the child. Indeed, it would seem that such legitimation could even be alleged as one of the reasons for the granting of the dispensation from whatever impediment might exist between Grace and Henry, including the impediment of crime. But if the parentage of George were not excluded by proof, could such a reason be offered for the dispensation? The answer to this question involves a determination as to the juridical presumption that must govern in determining the child's parentage. Since the pregnancy is known before the celebration of the second marriage, it can not but be presumed that the child is the legitimate offspring of the first marriage. Consequently, legitimation by subsequent marriage is excluded. These distinctions would have some importance if the child were to be considered as a candidate for the episcopate. For if he were merely legitimated, he would be disqualified.

But if it can not be established whether Grace was pregnant at the time of the celebration of the second marriage, there appear to be two presumptions militating against each other. No matter which prevails, it would appear that the child is legitimate. If the parentage of George is not excluded by proof, what solution is to be reached? Is the child to be presumed the child of George because born within ten months of the time when Grace and George cohabited? Or is he to be presumed the child of Henry because born more than six months after the marriage of Grace and Henry?

On the basis of what commonly occurs, he should be presumed the child of the first marriage. But does this suffice to solve the juridical question? If either presumption yielded to contrary direct or

indirect proof, the other would govern the solution. For instance, it might even be shown that Grace and Henry did not cohabit after the celebration of their marriage. While that fact would not deprive their marriage of the power of making legitimate an otherwise illegitimate offspring, it would contradict the presumption that the child was a legitimate child of that marriage. In practice, some such solution will usually occur. The conflict of presumptions will ordinarily not remain unsolved. But in the event that it could be solved in no other way, it would seem that the presumption that the child is the offspring of the marriage in possession at the time of his birth would prevail over the presumption that would regard him as the offspring of a marriage which was dissolved by death prior to the marriage of those persons who are juridically husband and wife at the time he is born to the woman in the case.

McDevitt,[1] relying on Ciprotti,[2] thinks that in a conflict of the two presumptions, a presumption of fact should be relied upon, as indicated in the first sentence of the preceding paragraph set forth above. However, a presumption of law seems superior to a presumption of fact and to stand beyond the latter's control. To hold his opinion, it is necessary to say that a legal inference yields to an inference of fact. This is to place the judge's inference above the inference made by the law. Of course, no one would hold this to be sound in the case where an inference of fact is in conflict with a single inference of law. But even when two inferences of law are in conflict, the proper solution does not seem to cause one to yield to an inference of fact. The conflict should be solved rather on purely legal grounds, without any admixture of the factual, unless the latter amounts to proof.

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1 *Legitimacy and Legitimation,* The Catholic University of America, Canon Law Studies, n. 138 (Washington, D. C., 1941), 120.

2 "De prole legitima vel illegitima in iure canonico vigenti"—*Apollinaris,* XII (1939), 329-347, at p. 346.

FORM OF INVENTORY TO BE FILED BY A BISHOP WITH HIS METROPOLITAN

The II Plenary Council of Baltimore (n. 204) and the III Plenary Council of Baltimore (nn. 268, 269) provide that bishops shall safeguard the succession of diocesan property by filing, within three months of their consecration, proper legal evidence with their Metropolitan. Neither the Code nor the Councils of Baltimore require that the instrument safeguarding succession should be a will; any other instrument, valid in secular law will suffice. A duly executed inventory, rather than a will, seems to be the more expedient form; it should be signed and sealed and acknowledged before a notary. The elements of that inventory should be:

1. I name Rev. ....., priest of the Diocese of ...., to be the guardian of the episcopal key to the diocesan archives and to administer the personal property of the Church possessed by me until the appointment of my successor. (Cf. Canon 380; 1301, § 2.)

2. I name the same Rev. ....., to be administrator of the following parcels of real property belonging to the Church but held by me with title in fee simple. (Here list such real property as may have been conveyed to the bishop in his personal capacity, either by deed or devise, i.e., such as do not indicate that he holds in his capacity as corporation sole. List also any claims to real property that may not be manifest in a written document, such as easements or rights by adverse possession.)

3. I herewith itemize the personal property in my possession belonging to the cathedral church, the administration of which I herewith entrust to the aforesaid Rev. ....., under the terms stated above. (Here list the property not bought with personal funds including mitres, chasubles, pluvials, tunics, dalmatics, gloves, albs, cinctures, linen amices, missals, graduales, chant and hymn books, pontificales and canons, chalices, patens, pyxes, ostensoria, thuribles, holy water vessels, pitcher and basin, holy oil vessels, cruets and basin, the bell, the candelabra and the cross, croziers, the faldstool, library books, pictures, tables, chairs, radios, desks, file cases, automobile, etc. Of course, gifts to the bishop of these items become his personal property and should not be listed here.

Rings and pectoral crosses belong to the bishop no matter with what funds obtained, unless there are relics of the true Cross in the pectoral cross, in which case the relics belong to the cathedral and should be listed here.) (Cf. Canon 1288, 1299, § 1.)

4. I herewith exclude from the administration of Rev. ...., the following items of personal property, belonging to me personally, which I entrust to ....., the executor of the will disposing of my personal and real property, executed by me on .....

5. I herewith equally exclude from the administration of Rev. ....., the following parcels of real property, belonging to me personally, which I desire to pass by devise under the terms of my aforesaid will executed on .....

6. I name Rev. ....., aforesaid, to administer so far as may be necessary to preserve the rights of my successor in office, the following parcels of real property held by me as corporation sole (or as trustee for the respective parish or cathedral churches). (Here list all the deeds to real property held by the bishop in his official capacity; the information contained on the filing face of the deed should be set down.)

(s) .....

This form may be varied, though its provisions should be substantially set forth in any form employed.

Decrees and Decisions

CANONICAL

An Instruction of the Sacred Congregation for the Propagation of the Faith was issued June 21, 1942,[1] relating to the information which it required before establishing new Prefectures or Vicariates or Dioceses. It indicates that it is to be informed of the history of Catholic missions in the territory affected; the reasons for seeking the establishment of the new ecclesiastical unit; a complete geographical description of the new unit, with printed and colored maps, following as nearly as may be existing political or ethnological subdivisions; a complete political and sociological description of the territory; the number of Catholics with an indication of the degree of loyalty to the Faith; a full description of the missionary personnel, including the number of native priests and the possibilities of a native clergy; the extent of heresy or schism; the difficulties in the way of missionary activities; the geographical distribution of the Catholic population; the chosen residence of the Ordinary and the condition of the church and house there; the situation as to physical property in general; the means of support; the generosity of the natives; the possibility of government subsidy; the number of catechists and their competence; the existence and functions of religious communities; the means of educating the clergy; the existence of Catholic schools and the attendance of non-Catholics; the existence of charitable institutions and pious societies; the name and rank of the ecclesiastical unit involved in the division and the plan for the division of ecclesiastical property.

* * * *

An Encyclical, dated June 29, the Feast of the Apostles, SS. Peter and Paul, and entitled "*Mystici Corporis*", cites the Catholic doctrine on the subject and exposes modern errors concerning it. Among the latter are enumerated the disapproval of frequent confession, the denial of the value of private prayer through insistence

[1] *AAS*, XXXIV (1942), 347.

on the liturgical, and the forgetfulness of the fact that Christ is Supreme Judge as well as Intercessor.

* * * *

The Bishops of Canada have received faculties from the Holy See permitting partial dispensation from the Eucharistic fast in behalf of those who work at night; the conditions being that the fast be observed for four hours with abstention from alcoholic liquor from midnight.

* * * *

Rescripts from the Sacred Congregation of Rites and Ceremonies have been received by Most Rev. Joseph C. Willging, D.D., Bishop of Pueblo, and Most Rev. Peter L. Ireton, D.D., Apostolic Administrator of Richmond, permitting the offering of Holy Mass in certain specified parishes in the respective dioceses at an afternoon hour in order to meet the needs of workers in war industries.

* * * *

On June 13, the Political Office of the Communist Party at Costa Rica called in San Jose a National Conference of the Party, decreed the dissolution of the Party, and the founding of a new Party, called Vanguardia Popular. The head of the new group, Dr. Manuel Mora Valverde, who had been general secretary of the Communist Party of Costa Rica, addressed a letter to the Archbishop of San Jose, Most Rev. Victor Sanabria, informing him of the situation, and asking whether there were any obstacle to Catholics' joining the new Party. After consulting the Bishops of Alajuela and Limon, he replied that in the new Party there had been found a solution in a degree of the conflicts of conscience which stemmed from the situation previous to the dissolution of the Communist Party. Even the old Party was not Communist in the accepted sense; while the new Party favors the policy of President Calderon Guardia based upon the Papal Encyclicals and declares that this policy fits in without contradiction with the plans of the Party for the economic and social organization of the country.

* * * *

The National Catholic Welfare Conference has been authorized to publish photostatic reproductions of the *Acta Apostolicae Sedis*, for distribution in North, Central and South America, Australasia, Africa and China.

* * * *

The printing of The Code of Canon Law in Chinese has been announced by Archbishop Mario Zanin, Apostolic Delegate to China.

SECULAR

Recent Decisions Affecting Religion, Charity, and Education

Churches

Property

Thomas v. St. Joseph's Polish National Catholic Church of McKees Rocks, 22 A. (2) 661, 343 Pa. 328. In this case, the church failed to pay fire insurance premiums and taxes, and its failure was construed as constituting such a failure of consideration in the matter of its contract with a bank as to justify the latter in refusing to abide by the terms of the contract.

In re Evangelical Church of Lansford, 24 A. (2) 42, 147 Pa. Super. 340. The property of an extinct church is not subject to division among its members; but neither does it revert to the grantors. Land set aside for the uses of charity and religion is practically inalienable, and statute gives power only to sell land and apply proceeds. If no meeting of the congregation giving proper authority is shown to have been held and no other source of authority is proved, the act of the trustees, giving the grantor of property dedicated to religious purposes the right to repurchase the property in the event of the sale of such property, was without validity. In this case, the rules of the parent church of the unincorporated association which had become extinct, provided that the assets of the extinct congregation should revert to the Church Conference. The court of common pleas had the authority on the petition of the presiding elder of the Conference to order the sale of the real estate and the payment of the proceeds to the Conference.

Chester Housing Authority v. Ritter, 25 A (2) 72 (Pa.). Under a statute (10 P. S. § 121) an unincorporated church congregation was competent to contract to buy land. When land is conveyed even in trust to a church, the conveyance vests absolute legal title in the church, subject to the limitation that the property may not be diverted from the uses to which it has been lawfully dedicated.

King v. Richardson, 46 F. Supp. 510 (North Carolina). Property conveyed to church trustees will generally be deemed the property of the church of which they are trustees.

Sands v. Church of Ascension and Prince of Peace, 30 A (2) 771 (Md.). Bonds were given to a church with an expressed wish that the income from the bonds should be used for paying ground rent

or that the bonds should be sold and the proceeds applied to the extinguishing of the ground rent. The church sold the property on which the ground rent was owing. The court held that the original grant was not made upon condition, but rather that the intent manifested was that upon the extinguishing of the ground rent without the sale of the bonds, the church should retain the bonds without any resulting trust in such bonds in favor of the donor's estate.

Rosenbaum v. Drucker, 31 A. (2) 117, 346 Pa. 434. The subject matter of the bill in equity was a controversy concerning property and the bill prayed for an accounting. The subject matter was referred to arbitrators by stipulation of counsel, without reference to the accounting. The arbitrators found that the defendants were in wrongful possession; and this finding justified an accounting.

Conflict of Law

Evangelical Lutheran Synod of Kansas and Adjacent States v. First Evangelical Lutheran Church of Oklahoma City, 47 F. Supp. 954 (Okla.). When a church is an integral part of a general organization, with a direct and inheritable interest in the latter, it is forever a part of it, unless its rights should become forfeited under a judicial decree, or dissolution of the bond should be effected by mutual consent of the superior and the subordinate body. Action for secession by the latter is not effective, therefore, until it has been favorably accepted by the superior body in conformity with its rules. Therefore, in this case, in which the synod refused to recognize the attempts of a subordinate church to withdraw from it, the synod's decision was final in the absence of review upon appeal by a tribunal superior to the synod. And where a question of this kind, i.e., involving discipline, faith, ecclesiastical rule, custom, or church government, is concerned, the decisions of the church tribunals are binding on the civil courts.

Trustees of Delaware Annual Conference of Union American Methodist Episcopal Church v. Ennis (Del.), 29 A. (2) 374. The findings of a committee appointed to try a pastor were nugatory in this case because the committee was not the tribunal for which the discipline of the church made provision. The action of the general conference in attempting to substitute this committee was of no effect as being beyond the power of the conference, which was forbidden by the general discipline to change the rules of the constitutional government of the church. The burden of proving removal

to be valid was on party relying on the findings of the committee. The bill seeking injunction against pastor's interference with use of church property by the complainants should be dismissed in the absence of such proof.

Petition of Presbytery of Philadelphia of Presbyterian Church in the U. S., 32 A. (2), 196, 347 Pa. 263. Under statute (10 P.S. §§ 81, 81a) the real and personal property held in the name of the Presbyterian church involved in the case was held subject to the rules and regulations of the Presbyterian Church in the United States. In the proceeding for the dissolution of the church, the petitioners showed cause for and were entitled to a decree of dissolution, since the record disclosed no prejudice to the public welfare or to the interests of the members of the church corporation that would result from it. Upon dissolution the property would be held and used as the Presbytery would direct, and the latter was therefore justified in decreeing a transfer of the property to a corporation authorized to take title to property in trust, subject to the lien of church's debts, and it was not the function of the court to adjudicate the exact nature and extent of the church's interest in the various assets taken over by the liquidating trustees.

Vaughan v. Maynard, 170 S. W. (2) 897, 294 Ky. 38. Each Baptist congregation is an independent body governing itself. Differences concerning management and control are decided by a majority vote of the congregation and generally no appeal lies to any higher ecclesiastical authority. Consequently if the notice of the trial of a minister and his followers is sent only to the minister and not to a majority of the members of the congregation, the decision of the moderator and his presbytery of ministers can not be held effective to deprive the minister and his followers of the right to possess and hold title to congregation property and can not be made the foundation of an action at law for the recovery of the title to the property of the congregation.

Corporate Action

Haight v. First Baptist Church of Camillus, N. Y., 42 F. Supp. 925. A religious corporation's powers are limited to those given it by the law of the State, and where the power is not given to a church to own the stock of a national bank, prohibition of such ownership under the laws of New York is implied.

Slaughter v. Land, 21 S. E. (2) 72 (Ga.). An unincorporated church sues through its members collectively and not as tenants in common, and is not controlled by the rule in ejectment that in the case in which tenants in common sue, all must recover or none will recover.

Petition of Hayes, 38 N. Y. S. (2) 66 (N. Y. Sup.). The act of the trustees of a church corporation in opposing a program calling for the expenditure of a considerable amount of money was not misconduct that would warrant removal. It is also observed that statutory notice of meetings must be sent even though quarterly meetings are regularly held.

Clevenger v. McAfee, 170 S. W. (2) 424, transferred 165 S. W. (2) 411 (Mo. App.). When the control of the property of a voluntary church association having the congregational form of government is lodged with trustees by custom and practice, but not by written instrument, such trustee may generally be replaced by the will of the majority. And if a trustee so removed has taken part as a member of the minority group in a regular business meeting of the church at which his removal was voted, he can not later complain, though he actually left the church prior to the taking of such vote. Injunction was also issued restraining the leaders of the minority group from exercising dominion over the property of the church. It was further noted that the time of meetings is also determined by the majority in a church congregation recognizing no control by any higher ecclesiastical body.

Membership

Federal Savings and Loan Ins. Corporation v. Strangers Rest Baptist Church, 131 P. (2) 654, 156 Kan. 205. A church society continues to exist and to be bound by the lawful obligations incurred by its former members, even though changes in membership have occurred.

Minister

Buttecali v. U. S., 130 F. (2) 172, affirming *U. S. v. Buttecali,* 46 F. Supp. 39 (Texas). A duly ordained minister is one who has followed a prescribed course of study of religious principles, has been consecrated to the service of living and teaching that religion through an ordination ceremony under the auspices of the church

as its minister in the service of God, subject to the control or discipline of a council of the church.

Norton v. Normal Park Presbyterian Church, 47 N. E. (2) 526, 318 Ill. App. 233. A pastor agreed to a reduction in salary because otherwise the church would have been unable to pay him and he could not have continued in his position. The court held that this situation provided sufficient consideration to make the agreement binding. The church's constitution also permitted such a reduction if the minister and the congregation both agreed. Consequently, the assignee of the pastor was not entitled to recover a balance based on the original figure.

Dissolution

New Jersey Baptist Convention v. Fidelity-Philadelphia Trust Co., 23 A. (2) 560, 130 N. J. Eq. 603, affirming 20 A. (2) 67, 129 N. J. Eq. 525. The statutes authorizing the Court of Chancery to enter an order declaring a Baptist church to be extinct and transferring its property to the Baptist Convention are single in their purpose; and an order issued thereunder does not affect the claims of strangers to ownership or possession but such claims must be litigated in proper actions. The executor of a testatrix who gave her residuary estate to a Baptist church, alleged to be extinct, for the erection of a new church, had no interest or right to sue for a decision as to whether church was extinct. And before the adjudication of the latter question, the Baptist Convention had no right to ask the Court of Chancery to construe the will or to bring the executor before the Court.

SCHOOLS

Charter

Trustees of Philips Exeter Academy v. Exeter, 27 A. (2) 569, 90 N. H. 472. It was held that the charter was revocable when granted by the General Assembly prior to the enactment of the constitution. It could become irrevocable only if it was a valid contract when made. But it was not a valid contract because it divested the State of some part of its sovereignty.

Tuition

Tabor Academy v. Schwartz, 30 A. (2) 22, 129 N. J. L. 390. The contract provision required that upon withdrawal of a pupil the tui-

tion fees of the entire year would be nevertheless payable. The headmaster's contrary statement to a mother was held as not binding on the academy, which was incidentally unincorporated.

Tort

Guerrieri v. Tyson, 24 A. (2) 468; 147 Pa. Super. 239. Delegated parental authority permits a teacher to exercise reasonable corporal punishment for the purpose of maintaining discipline, but not to decide as to treatment of pupil's infected finger.

Appeal of School District of Borough of Old Forge, 43 D & C, 167 (Pa. Com. Pl.). Reports of vile statements made by child in school yard were brought to teacher on the grounds. The child admitted making the statements. The teacher slapped the child and sent it to the class room to which it belonged. The teacher was tried and dismissed by the school board on the ground of cruelty. Appeal was made to the Superintendent of Public Instruction, who reinstated the teacher. The action opposing reinstatement was dismissed by the court, which held that to limit to the principal and to the teacher while on duty in her room the proper correction of pupils would be subversive of discipline.

Kos v. Catholic Bishop of Chicago, 45 N. E. (2) 1006, 317 Ill. App. 248. A pupil of a parochial school was injured while eating lunch in the lunch room of the school. The injury was caused by a handbrush thrown by another pupil. The court held that the pupil who threw the brush was the intervening proximate cause. The owners and operators of the school were not liable either on the basis of tort or contract. Not on the basis of tort, because they were not the proximate cause; consequently, their failure to remove the handbrush from the lunch room and to provide proper supervision, if negligence, was immaterial. Not on the basis of contract to furnish reasonably safe premises, because intervening act was not theirs but the act of a third party.

Transportation

Adams v. County Com'rs of St. Mary's County, 26 A. (2) 377 (Md.). Court construed Acts of 1941 (c. 609), 1939 (c. 140), and 1935, providing for transportation of private school children. The Act of 1941 gave the right to private school children of St. Mary's County to travel in public school buses along the regular route of such buses. The Act of 1939 authorized the county commissioners of St. Mary's

County to appropriate $10,000.00 to provide transportation of private school children in buses provided from any source. This Act, in turn, was to provide the county commissioners of St. Mary's County with broader authority than was contained in the Act of 1935 relative to the transportation of private school children in buses of the board of education. The court said that this intention must be allowed to prevail in any conflict between the two Acts. The court said that the Act of 1941 did not repeal the Act of 1939; consequently, the transportation of private school children is not confined to public school buses along the regular route, but the county commissioners still enjoy authority to appropriate $10,000.00 for the transportation of private school children in buses provided from other sources. An attempt was made to show that the Act of 1939 is unconstitutional as being discriminatory. That is, there was an Act providing for public school children in *consolidated* public schools, and an Act for private school children; but no provision was made for public school children in *non-consolidated* public schools. The court rejected this contention on the ground that no evidence had been introduced to show that any public school children were not being supplied with transportation.

Mitchell v. Consolidated School District No. 201, 135 P. (2) 79 (Washington). The legislation providing for the transportation of pupils to and from public schools is defensible only as an exercise of a governmental function furthering the maintenance and the development of the public school system. The statute commanding the directors of public school districts in which buses transported pupils to and from public schools to carry private school children, was said by the court to be contrary to the constitutional requirement that revenue derived from the common school fund and state taxes for the common schools should be applied exclusively to the support of the common schools. It was said also to be contrary to the constitutional requirement that all schools supported in whole or in part by public funds should be free from sectarian control and the constitutional prohibition against the appropriation of money or property to religious worship, exercise or instruction, or to the support of any religious establishment.

Text Books

Haas v. Independent School Dist. No. 1 of Yankton, 9 N. W. (2) 707 (S. D.). Authorities are not justified in furnishing text books to

school pupils without constitutional or statutory authorization. The court held that when the statutes refer to schools of the county, they mean the public schools; and when they refer to school district, they refer to the corporate body and not to geographical limits. Consequently, the statutes in question are limited in their scope to the public school system. The statute relating to text books aims at insuring uniformity in the text books used in the public school system of the county and at providing the machinery for the distribution of these text books to the school districts in it. Under it, text books could not be furnished to pupils of private, sectarian, or parochial schools or to any other person not actually enrolled in and in attendance at some school maintained as a part of the public school system of the State.

BODIES OF THE DECEASED

Autopsy

Simpkins v. Lumbermens Mut. Casualty Co., 20 S. E. (2) 733 (S. C.). A corpse is not property but quasi-property, over which the deceased's relatives have certain rights, the primary right residing in the spouse as to the control of burial, unless the deceased made some contrary provision. Action for the wilful mutilation of a corpse may be instituted by the spouse, or if there be no surviving spouse, by the next of kin according to the statute of distribution; but an administrator may not institute such action. The widow of the deceased was entitled to sue where the burden of the complaint was the lack of regard for her feelings, trespass on her rights, humiliation, and embarrassment, resulting from the performance of the autopsy without notice to her. However, in this particular case, she had no right of action because of the provision of the Compensation Act, which gives the employer the right to an autopsy, without any provision for hearing or notice, in the case where the employee dies of a heart attack without intervening accident; and the employer's insurance carrier enjoyed the same right.

Tort

Grill v. Abele Funeral Home, 42 N. E. (2) 788, 69 Ohio App. 51. A husband had instructed the mortician conducting the funeral of his deceased wife not to remove the jewelry from the corpse. Contrary to these instructions, the mortician did remove the jewelry. The court held, however, that this did not constitute a profanation

of the body or wilful and malicious misconduct on the part of the mortician; and that the mortician was not liable to the husband for damages for mental suffering.

Right of Burial

Teasley v. Thompson, 165 S. W. (2) 940 (Ark.). The body of a deceased person is not property subject to the laws of descent and distribution. He who has charge of it for burial is exercising a trust for all who are interested. The person entitled to this right is the surviving spouse, if the parties were living together at the time of death. It is a legal right, coupled with certain duties, which the courts will protect; and a violation of it will give rise to a suit for damages. However, the absence or failure to act on the part of the surviving spouse, has the effect of transferring the right and duty to the next of kin. In this case, the decedent wife spent the greater part of the last year of her life in her mother's home and received the care of her mother in her last illness, while her husband seemed indifferent, making no provision for her. His right was thus transferred to the decedent's mother, who was entitled to maintain an action for damages against him for his depriving her of the opportunity of giving the body Christian burial by unlawfully retaining possession of it for a period of seven days.

Liability for Funeral Expenses

Griffin v. Cole, 131 P. (2) 989 (Ariz.). The statute which imposes the duty of burial upon specified persons does not impose upon them financial liability, but merely indicates those upon whom the duty of burial rests under specified circumstances. If the parties charged with burial are obliged to make expenditures, these are properly a charge against the estate of the deceased and may be recovered.

Carton v. Shea, 45 N. E. (2) 826 (Mass.). The nature of the agreement will determine whether the person contracting for funeral services is liable for the cost. In the given case, there was a contract for such services made by a cousin of the deceased, who was the beneficiary under a $500.00 policy on the life of the deceased and was also administratrix of the decedent's estate. Evidence was said to sustain the finding that the cousin was originally liable in her personal capacity.

TRANSFER

In re Plancher, 37 N. Y. S. (2) 87 (N. Y. Sup.) The children of a deceased woman desired, with the consent of all, to remove the body of their mother from a plot owned by a Jewish congregation of which she was a member and in whose plot the burial was originally considered to be permanent. The reinterment was to be made in a private family lot in another cemetery in which all the members of the family could be buried. The only objector was the Jewish congregation. It was held that the deceased's husband was entitled to remove the body.

Koon v. Doan, 2 N. W. (2) 878, 300 Mich. 662. If decedent left no instructions as to his burial, the wishes of his widow and children are regarded as governing with regard to the place of burial. But after burial, the courts will not permit removal unless good reasons intervene. In this case, the plaintiffs desired to transfer the body of their father from a cemetery in which he had been interred by the persons with whom he had lived for eighteen years, having had no association with his children during all that time. The court said that the father had practically become a member of the defendants' family and that the defendants had apparently buried him where he desired to be buried. Consequently, in the absence of any claim that the plaintiffs had been denied access to their father's grave, permission to disinter the body was to be refused.

Rivers v. Greenwood Cemetery, 22 S. E. (2) 134; 194 Ga. 524. The courts will protect the rights of relatives in the quasi-property of a body of a deceased relative. In the case of a deceased wife, this right resides in the husband, who has the further right of removing her remains from one place of repose to another, if this right is exercised in a proper manner and from reasonable motives. In this case, the husband thought that the cemetery lot of first interment belonged to his daughter, and that his own body would later be placed next that of his wife. He learned later that the lot belonged to another and that there would be no space for his own remains. Court allowed him to transfer the body to a lot purchased so that he could carry out his original purpose.

Application of Glasser, 41 N. Y. S. (2) 733 (N. Y. Sup.). Since ecclesiastical law is not part of the law of the State, the right to disinter must be determined upon equitable grounds. In this case, removal of the remains of the petitioner's wife and son was per-

mitted for the purpose of reinterment in a private family plot in the same cemetery, because there was no specific agreement on his part not to disinter and no specific rule had been promulgated by the cemetery association preventing disinterment. Several technical objections were also met by the court: the consent of another son under fourteen, if invalid, was not necessary; failure to give notice of eight days as required by the New York statute was healed by the general appearance put in by the objecting association; the Superior Court of Kings County had jurisdiction to hear application even though neither the petitioner nor the cemetery association resided or had a place of business in Kings County and even though cemetery itself was located in Nassau County.

Application of Bobrowsky, 42 N. Y. S. (2) 36 (N. Y. App. Div.). Here the wife desired to remove the body of her deceased husband to a private family plot and the only objector was the society which owned the cemetery in which the body was buried. Court said petition should have been granted.

CEMETERIES

Management

Emmerglick v. Vogel, 24 A. (2) 861, 131 N. J. Eq. 257. A cemetery is a charitable trust and its directors are trustees in charge of the management and the operation of a quasi-public service corporation. Cemetery lands may not be mortgaged for purposes other than to secure the payment of purchase price. In this case the president of the cemetery corporation and one of its directors entered into an agreement by which the director would lend the cemetery $7,000.00 to be repaid in the amount of $14,000.00 at the end of six months. Certain burial lots were at the same time conveyed to the director, and the court said that if these lots were to be treated as security, the conveyance was void as against public policy as an attempt to mortgage lands dedicated to the use of the cemetery. It was further stated that the president and director were charged with the duty of maintaining the integrity of the capital for the benefit of creditors, of the corporation, and of those beneficially interested in it in its character as a public trust.

Mayo v. Interment Properties, 128 P. (2) 417 (Cal. App.). In this case one of three directors of a cemetery corporation offered his resignation to be effective on the election of his successor. Then he and another director appointed the successor, the third director re-

fusing to vote. Then the newly elected director and the one who elected him, over contrary vote of the third director, approved a bill for attorney's services rendered by the director who had resigned and another attorney. The court held the election and the approval of the bill to be valid.

Young v. Bunnell Cemetery Ass'n, 46 N. E. (2) 825 (Ind.). A cemetery association was formed in 1888 by a group of more than thirty persons who adopted articles of association and recorded them in the miscellaneous records of the recorder of the county. The court held that this was sufficient to legalize the incorporation of this association under the State statute providing that a cemetery society is legalized if it has, previously to the statute, recorded its articles of association in the miscellaneous, mortgage or deed records of its county. Further, the statute relating to the incorporation of cemetery associations and the exercise by them of eminent domain, manifests the intent not only to legalize imperfectly incorporated associations, but to vest the right of eminent domain in any owner of any public cemetery which has been in existence for thirty years or more, whether incorporated or not.

Evergreen Memorial Park Ass'n v. Evatt, 46 N.E. (2) 286, 141 Ohio St. 1. A cemetery association is entitled to acquire land up to 640 acres. If this land is held exclusively for burial purposes, it is exempt from taxation, even though it may not be in actual use as burial ground.

Title of Lot Owners

Polmona Cemetery Ass'n v. Board of Sup'rs of Los Angeles County, 122 P. (2) 327 (Cal. App.). Generally the transfer of a cemetery lot does not convey title but merely an interest which may be used only for the purpose of burial.

Halloway v. Thompson, 42 N. E. (2) 421 (Ind. App.). The relation of the owner of a cemetery lot to the corporation is in many respects that of corporation and stockholder. Lots stand in the place of stock as representing the stockholder's interest.

Rivers v. Greenwood Cemetery, 22 S. E. (2) 134, 194 Ga. 524. When one is permitted to bury his dead in a public cemetery by the express or implied consent of those in control of the cemetery, he acquires a form of possession in the spot in which the body is buried.

Mitchell v. Pinelawn Cemetery, 37 N. Y. S. (2) 207 (N. Y. Sup.). The State statute which requires the setting aside of funds realized

through the sale of lots for the preservation of the grounds was indeed beneficial to the lot owners but it did not give them individually an interest in this fund sufficient to enable any one to support an action for an accounting. Certificate holders of the corporation, on the other hand, have a direct interest in the fund and the corporation is their agent or trustee in the management of the fund. Neither can the lot owners sue the corporation through a group of lot owners acting in a representative capacity against the corporation, because the latter has no fiduciary relationship towards the lot owners. The latter have only a right to interment and a right to care for their lots, subject to the restrictive rules of the corporation as they existed in the contract.

Cemetery Regulations

Johnson v. Cedar Memorial Park Cemetery Ass'n, 9 N. W. (2) 885 (Iowa). Cemetery associations have the right to provide, in a manner not arbitrary or discriminating, but nevertheless with some discretion, reasonable rules for the general improvement and adornment of the cemetery. The unreasonableness of the rule must be shown by him who alleges it to be so. However, such a rule must not be in derogation of rights previously granted to a lot owner. A rule allowing only bronze markers is reasonable if it is applied generally even to a section of a cemetery. In this case even though granite markers had been installed on some graves prior to the adoption of the rule, it was shown that 85 per cent of the markers installed even at that time were bronze. Consequently those who bought lots after the adoption of the rule could not complain that the rule was unreasonable or discriminatory.

Upkeep

Forest Hill Cemetery Co. v. City of Ann Arbor, 5 N. W. (2) 564, 303 Mich. 56. The upkeep, care and maintenance of a cemetery are necessary to carry out the public policy of the State of preserving and maintaining the burial places of the dead.

French v. Kensico Cemetery, 35 N. Y. S. (2) 826, 264 App. Div. 617, affirming 30 N. Y. S. (2) 737, 177 Misc. 395. A sum of money was paid to a cemetery company for the care of a mausoleum and burial plot. The court said that this agreement created an agency or power coupled with an interest in the company and was irrevocable as long as the need for this care continued. It was founded on

sufficient consideration on the company's part, which was the latter's agreement to relieve the owner of the trouble and annoyance involved in such care.

Tort

Hutchison v. Hillside Cemetery Ass'n, 4 N. W. (2) 81 (Minn.). While attending a burial service in the cemetery, the plaintiff stepped backward to let others pass and was injured when she tripped on a wire pedestal standing on another grave, placed there for the holding of flowers by the lot owner, though this was forbidden by the cemetery regulations. The cemetery therefore had the power to remove the pedestal. The plaintiff could have seen the pedestal had she looked behind her. But she did not do so. Further, the plaintiff had seen other similar holders in the cemetery, but had been told not to use them, as their use was forbidden by the cemetery regulations. It was held that these facts did not, as a matter of law, establish contributory negligence on the part of the plaintiff. On the other hand, the cemetery association was bound to keep its premises in a reasonably safe condition for the use of an invitee, which the court held the plaintiff to be, and to give the latter warning of latent or concealed defects. This it failed to do under the facts of the case, and was consequently properly found negligent.

Independent Potok Zloty Sisters and Brothers Benev. Soc. v. Highland View Cemetery Corporation, 35 N. Y. S. (2) 512, 264 App. Div. 396. A cemetery corporation has a duty to lot owners to keep the cemetery in a reasonably safe condition, but it is not an insurer of their lots. Consequently, when the driver of a wagon truck delivering fertilizer ordered by the corporation so negligently drove the horses that the wagon demaged the entrance structure to the burial lot, the corporation was not liable to the owner of the lot.

CONSTITUTIONAL LAW

Conscientious Objectors

Rase v. U. S., 129 F. (2) 204 (C.C.A. Mich.). The Constitution grants no immunity from military service because of religious convictions. Immunity in this matter is, on the contrary, based on the indulgence of Congress acting in accordance with a traditional American policy of deference to conscientious objection and to one's holy calling. The fact that one is classified as a conscientious objector rather than as a minister of religion, exempt from combat

and non-combat service, was not contrary to the guaranty of the First Amendment.

Baxley v. U. S., 134 F. (2) 937. The rights of an individual under the First Amendment of the Federal Constitution are not limitless or absolute, though the Amendment is to be liberally construed. Therefore, when religious views are put into practice, that practice may be restrained when it involves clear and present danger to the safety, morals, health or general welfare of the community or violates laws enacted for its protection. Consequently, it is no excuse for the violation of a criminal statute that one was acting under a sincere belief that he was merely performing his religious duty. Therefore, a member of Jehovah's Witnesses, charged with advising the evasion of the Selective Service Act, could not rely on the guaranty of religious freedom as defense, even though he may have thought sincerely that he was fulfilling a mission imposed on him by God (C. C. A. S. C.)

Religious Test in a Will

Delaware Trust Co. v. Fitzmaurice, 31 A. (2) 383 (Del. Ch.). The constitutional guaranty of religious freedom is a limitation on the powers of the government not on the rights of the governed. Moreover, the mere inducement to adopt or to adhere to religious belief is not, in any event, a denial of religious freedom. Consequently, a bequest in trust involving a condition precedent that the beneficiary should be a recognized member of the Roman Catholic Church was not invalid and was not opposed to the State or Federal provisions guaranteeing religious freedom.

Religious Freedom in Education

Harfst v. Hoegen, 163 S. W. (2) 609 (Mo.). Under the Bill of Rights the power over the subject of religion at that time was left to the State governments. In this case, a parochial school was incorporated into the public school system. At the same time, it remained an adjunct of the parish church in its religious teachings. Because children of every faith could be compelled to attend this school, and have actually attended it, its inclusion in the public school system constituted a denial of the constitutional guaranty of religious freedom in spite of the fact that attendance at Mass occurred customarily before school hours, that religious instruction was given during recess periods, that the participation of non-Catho-

lic children in these services was not demanded, and that the parents of the public school children had long acquiesced in the action of the school board. Similarly, the segregation of Catholic from non-Catholic children and the command that they attend one or the other of two grade schools according to their religion, was equally a denial of the guaranty of religious freedom, whether the schools were of equal or unequal facilities.

Assistance at Marriage

In re Saunders, 37 N. Y. S. (2) 341 (N. Y. Sup.). The statute which provides that a marriage is not legal unless performed by a minister affiliated with a religious society listed in the last preceding federal census of religious bodies is guilty of an invasion of and an unwarranted interference by the State with the freedom of religion guaranteed by the constitution.

O'Neill v. Hubbard, 40 N. Y. S. (2) 202 (N. Y. Sup.). Even an unorganized religious body or sect is assured the same degree of religious freedom by the State as is enjoyed by the larger denominations, in spite of the fact that the sect was not included in the last preceding federal census of religious bodies. It is an incident of the constitutional guaranty of religious freedom that one should be entitled to have his marriage solemnized by a minister of one's own faith. Therefore, in this case, which involved the application of a minister of a church, which obtained a charter in 1931 but was not listed in the last federal census, seeking to be registered as one authorized to perform a marriage ceremony, the statute prohibiting the granting of the petition was unconstitutional.

Free Speech

Shaw v. State, 134 P. (2) 999; *Wood v. State,* 134 P. (2) 1021; *Jaffee v. State,* 134 P. (2) 1027 (Okl. Cr. App.). Free speech can be suppressed only when there is reasonable ground to fear that serious evil is imminent because of its practice. The evil must be substantial, and even the expression of legislative preferences or beliefs can not transform the minor matters of public inconvenience or annoyance into substantial evils of sufficient weight to justify the curtailment of the liberty of expression. The First Amendment to the Federal Constitution is a command of the broadest scope. Consequently, neither an inherent nor a reasonable tendency to cause a substantial evil suffices to justify a restriction of free expression.

In re Whitney, 134 P. (2) 516. Mere legislative preferences or beliefs regarding matters of public convenience that might support regulations directed at other personal activities are insufficient to justify legislative interference with the exercise of the fundamental personal rights of freedom of speech and of the press. Therefore the fact that citizens are annoyed by addresses made in city parks and on other public grounds does not warrant such interference. Consequently a city ordinance prohibiting the making of public addresses on public grounds except under permit of the city manager who was authorized in his discretion to grant or withhold the permit, was void on its face as a violation of the constitutional rights of freedom of speech and of assembly.

Lawson v. Commonwealth, 164 S. W. (2) 972, 291 Ky. 437. The purpose of the federal and State constitutions in providing for the separation of church and state and guaranteeing religious liberty was to guarantee relief from laws making it a crime to deviate even in the slightest particular from the established faith or practice. Their purpose was not to guarantee the right to jeopardize the safety, health or welfare of one's fellow man under the protection of religious belief. Consequently laws enacted to restrain acts tending to disturb the peace or corrupt public morals are not repugnant to the constitutional guaranty of religious freedom, even though such acts may have been performed under the conviction that they were required by one's religious beliefs.

Breach of Peace

Hamilton v. City of Montrose, 124 P. (2) 757 (Colo.). The right of freedom of religion is not absolute but remains subject to regulation for the protection of society. Each case involving an alleged invasion of the constitutional rights of the freedom of speech and of religion must be determined on the individual facts. In the present case, an ordinance applied without discrimination prohibiting the use of loud-soundng devices as a means of attracting a crowd was held to be not unconstitutional. It did not invade the rights of the freedom of speech and of religion of a minister (defendant) in preventing him from using a loudspeaker on the city streets, for the reason given and because the ordinance was not dependent for its enforcement upon the whim of any individual.

State v. Martin, 5 So. (2) 377, 199 La. 39. The constitutional guaranty of freedom of speech and freedom of the press do not sanc-

tion trespass and the statute forbidding a person to trespass on the property of another does not violate these guarantees.

People v. Brossard, 33 N. Y. S. (2) 369 (N. Y. Co. Ct.). Courts must guard the guaranties of religious freedom against discrimination or preference. However, these guaranties can not justify acts of licentiousness or such as are inconsistent with the peace or safety of the State, such as the pretended telling of fortunes.

People v. Reid, 40 N. Y. S. (2) 793 (N. Y. Co. Ct.). A person may not breach the peace under the cloak of religious freedom.

Bennett v. City of Dalton, 25 S. E. (2) 726 (Ga.) City ordinances prohibited quarrelling and disorderly conduct. A member of Jehovah's Witnesses had been assaulted and a crowd had gathered. Another member of the sect was requested by a police officer to move on and refused. The ordinances when applied to him did not infringe upon the constitutional provisions guaranteeing freedom of speech, of the press, of worship, and of religious belief.

Distribution of Religious Literature

Decisions Favoring Regulation

Whisler v. City of West Plains, Mo., 43 F. Supp. 654. To engage in the sale of religious literature does not constitute an exercise of religious belief within the meaning of the constitutional guaranty of religious liberty.

Busey v. District of Columbia, 129 F. (2) 24. The license law of the District of Columbia prohibiting the sale of any article, except newspapers sold at large, on the public streets without a license, is not contrary to the right of religious freedom or freedom of expression, in spite of the fact that it covers the sale of religious literature. [These views seem untenable under recent decisions of the U. S. Supreme Court—cf. The Jurist, III (1943), 503, 504.]

Commonwealth v. Prince, 46 N. E. (2) 755. The channels through which freedom of the press and freedom of religion are exercised may be regulated in some measure by proper decrees promoting health, safety, and welfare. The statutes providing a penalty for the furnishing of articles to be sold by a minor engaged in street trade and for permitting minor under one's custody to work at street trade in violation of law were held not to be unconstitutional in the case at bar which involved a member of religious sect

who furnished religious periodicals to a minor girl who was under his custody and permitted her to sell and distribute the periodicals. (Mass.). [This decision seems based on an issue distinguishable from that of the U. S. Supreme Court in *Cantwell v. Connecticut*, 309 U. S. 626; 310 U. S. 296. Cf. THE JURIST, I (1941), 362; III (1943), 334, 503, 504.]

City of Washburn v. Ellquist, 9 N. W. (2) 121, 242 Wis. 609. A city ordinance required non-resident solicitors to register but did not vest any controlling or discriminatory power in the hands of any public official, did not demand a fee or tax, did not involve a religious test, and did not necessarily obstruct or delay the activity of any one. The ordinance was held not to be unconstitutional as applied to a member of the sect of Jehovah's Witnesses, as it did not violate any rights of freedom of religion, freedom of speech, or freedom of the press. [This decision seems based on an issue distinguishable from that in decisions of the Supreme Court of the United States favoring the activity of Jehovah's Witnesses.]

Decisions Not Favoring Regulation

Ex parte Walrod, 120 P. (2) 783 (Okl. Cr. App.). Members of the sect of Jehovah's Witnesses have a constitutional right to distribute their literature on the streets of the city, if they do so in an orderly manner, and until it can be shown that their literature contravenes public morals or is in any way improper for distribution.

Emch v. City of Guymon, 127 P. (2) 855 (Okl. Cr. App.). An ordinance prohibited the distribution of newspapers, handbills, tracts, or books within the city limits without a written permit from the city clerk. When applied to prevent a member of the sect of Jehovah's Witnesses from distributing religious literature, it was held unconstitutional as violating the right of freedom of the press and freedom of religion.

Commonwealth v. Richardson, 48 N. E. (2) 678 (Mass.). The going from house to house on the part of members of the sect of Jehovah's Witnesses for the purpose of spreading their religion, was held by the court to be a lawful pursuit and one from which they could not be deterred except by those having legal control of the premises.

Flag Salute

Decisions Favoring Regulation

McCord v. Page, 124 F. (2) 68 (C.C.A. Tex.). Military regulations which require that a soldier salute his superior officers and the flag do not interfere with religious liberty and the enforcement of them by a military tribunal does not violate the constitutional guaranty of religious liberty.

State v. Davis, 120 P. (2) 808 (Arizona). The State may insist that it has the right to use the educational process operating in the State schools for the purpose of inculcating respect for the flag and may employ such means as it thinks proper, requiring obedience from all in attendance under the penalty of expulsion. On the other hand, those who believe that the means employed are contradictory to their religious beliefs, and in particular the parents of the children attending the schools, have on their side the privilege of persuading the children that the means involved violate the law of God. But they have not the right, under the guaranty of religious liberty, to compel others to conform to the conduct in which they believe, and any attempt to direct or compel a child to refuse to follow the national custom of saluting the flag must be held as contributory to the delinquency of the child and may be made a crime by the State without violating the constitutional guaranty of religious liberty.

Taylor v. State, 11 So. (2) 663 (Miss.). Freedom to act, though included in the guaranty of religious freedom, must be subject to regulation for the protection of society. There is no conflict between the constitutional guaranty and loyalty to the flag and the government of one's country. Consequently the right of freedom of worship was not involved in a prosecution for the violation of a statute making it an offense to disseminate any theory likely to encourage disloyalty to the State and federal governments, to advocate the cause of the enemies of the United States or to create an attitude of stubborn refusal to salute or respect the flag or the government. [The issues in these cases vary from that in *Minersville School District v. Gobitis* (310 U. S. 586, rendered in 1940, reversed on June 14, 1943)—cf. The Jurist, I (1941), 32-39; III (1943), 333, 504.]

Cummings v. State, 11 So. (2) 683 (Miss.). The statute mentioned in the decision immediately preceding does not attempt to

coerce, control, or direct the conscience or the religious beliefs of any person and it does not command any one to salute the flag.

Decisions Not Favoring Regulation

State v. Smith, 127 P. (2) 518, 155 Kan. 588. The statute which makes it the duty of the State Superintendent of Instruction to prepare for use in the public schools a program requiring the salute to the flag at the opening of school each day would violate the constitutional guaranty of the right to worship God according to the dictates of one's conscience to the extent that it would authorize the expulsion of a child from school because of the sincere religious beliefs of the child or his parents.

Bolling v. Super Court for Clallam County, 133 P. (2) 803 (Wash.). So long as an individual's acts or refusal to act do not harm the public it is immaterial whether his religious beliefs are reasonable or not, so far as the guaranty of religious liberty is concerned. In order to require the individual to act, or to refrain from acting, in opposition to his religious beliefs, there must be found adequate justification in the necessities of the community. Consequently, the enforcement against the sect of Jehovah's Witnesses of the statute requiring school children to salute and pledge allegiance to the flag violated the State constitutional guaranty of religious liberty.

Barnette v. West Virginia State Board of Education, 47 F. Supp. 251. The constitutional right of religious freedom includes not only the right to worship God according to the dictates of one's conscience, but also the right to do or forbear to do any act according to the dictates of conscience, provided that the public welfare is not harmed; it is immaterial whether the religious belief is reasonable or not. One may not refuse to bear arms or pay taxes because of the dictates of conscience. There must be clear justification in the necessities of the community to warrant the overriding of religious scruples.

EXEMPTION FROM TAXATION

Inheritance Tax

In re Taylor's Estate, 40 N. E. (2) 936, 139 Ohio St. 417. A church institution which claims statutory exemption from the inheritance tax must prove that it is an institution devoted wholly to public charity exercised entirely or in substantial part within the

State of Ohio. Therefore a society was not exempt which was devoted to the purpose of circulating the King James Version of the Bible, inasmuch as its activity was rather the propagation of a branch of the Christian religion. Nor could it be exempt as an institution of learning on the ground that it was encouraging a wider circulation of the Bible, for it was giving no formal instruction, nor was it an institution composed of learned persons associated together to instruct in the accumulated knowledge of mankind other persons in a position to learn.

Unemployment Assessments

Consumers' Research v. Evans, 24 A. (2) 390, 128 N. J. L. 95. To obtain the exemption from contributions under the provisions of the unemployment compensation law, it does not suffice that the corporation employer be engaged in scientific or educational work, but it is required that it be engaged exclusively in it and that its net earnings should not accrue to any private shareholder or individual. Therefore the corporation involved in the case did not come within the exemption, even though it was organized to provide a clearing house for information of importance to subscribers as consumers of various articles sold in the open market and assembled this information through scientific and economic tests. Moreover, though not organized for profit, its assets would be distributed among the actual members of the corporation.

Fleming Hospital v. Williams, 169 S. W. (2) 241 (Tex. Civ. App.). An incorporated hospital admitted no strictly charity patients, was supported by no gifts, and paid from its income rentals, taxes, and insurance on property privately owned by a physician and his wife, who were two of the three directors. It was held not to be a corporation operated exclusively for charity and not exempt from contributions under the State unemployment compensation act.

California Employment Commission v. Bethesda Foundation, 128 P. (2) 874 (Cal. App.). The trial court is not to be held bound by the articles of incorporation in determining whether a corporation was devoted exclusively to charitable purposes, when the question involved was whether it was exempt as a charitable corporation from the contributions required under the unemployment insurance law, nor was the court bound by the fact that it was incorporated under a statute relating to non-profit corporations organized for

charitable purposes. The court could therefore consider the corporation's actual conduct and methods of operation; and consequently it could review the fact that shortly after the enactment of the unemployment insurance act the defendant was incorporated without any assets of its own and took over an institution previously existing; that it continued to operate it with its old staff; that it received no gifts or donations; that it had no legal obligation to perform any particular act of charity; that the institution was operated and maintained solely from payments made by patients, making a fixed charge for all services rendered; that it made an attempt to collect all charges even from a patient apparently unable to pay; and that it made deductions for unemployment insurance from its employees, which it did not pay over to the commission. These facts justified the finding that the corporation was not organized and operated exclusively for charity.

American Agriculturist v. Miller, 37 N. Y. S. (2) 98, 264 App. Div. 971 (N. Y. App. Div.). In the case in which the articles of incorporation do not limit the corporation's powers to educational, charitable, or scientific purposes, the fact that its stock is owned by another corporation dedicated to such purposes does not exempt it from the unemployment insurance contributions.

In re Peoples Theatres, 40 N. Y. S. (2) 55 (N. Y. App. Div.). A corporation which was incorporated to promote interest in contemporary theatre arts, to increase cooperation among playwrights and all others connected with these arts, and to improve the social, educational, artistic, and economic welfare of persons engaged in theatre work, was not a non-profit educational institution exempt from unemployment contributions under the unemployment insurance law.

Type of Institution Exempt

Board of Assessors of Boston v. Boston Pilots' Relief Soc., 40 N. E. (2) 889 (Mass.). Though an institution of a general charitable nature is exempt from taxation under the statute, the determination of its charitable nature depends on an inquiry into the language of its charter, of its constitution, and of its by-laws, into the objects which it serves and the method of its administration. The regulations of the Society involved in the suit indicated that it was organized solely to give aid and relief, with an admission fee of

$25.00, dues of $100.00 per year, and an initial assessment of approximately $4,400.00, but provided for the return of the assessment upon the retirement or death of a member. Consequently the retired members have enforceable personal rights and the Society was held not to be a benevolent and charitable corporation exempt from taxation.

Knights of Columbus Bldg. Ass'n of Bristol v. Gorham, 24 A. (2) 899 (R. I.). If a fraternal corporation is created to build and maintain a building for its meetings and for the accommodation of other fraternal bodies and if the entire net income which the corporation derives from the property is applied exclusively to the free education or the relief of the members of the corporation, or to the relief, support and care of worthy indigent members, or their wives, widows, or orphans, it is entitled to statutory exemption from taxation. However, the corporation involved in the suit was not entitled to such exemption. It was a corporation organized under the statute relating to corporations organized to carry on a business for profit and its articles of incorporation contained no restriction on the right of stockholders to receive income from their investments. Consequently, it was held to be a business corporation, in spite of the fact that the object of the corporation was declared to be the acquisition and the maintenance of a home for members of the fraternal corporation and the providing for the social and intellectual development of the members, and for the relief, support, and care of worthy indigent members.

In re Ladycliff College, 32 N. Y. S. (2) 407 (N. Y. Sup.). Realty was exempt from taxation in this case where it had been granted to a college to be held by it until it should cease to act in its corporate capacity, or should have its charter revoked, or should erect on the premises any building not intended and suitable for educational purposes. No building not specified in the Tax Law had been erected on the premises and the latter were not used in conjunction with commercial property owned by the college.

Socialer Turnverein v. Board of Tax Appeals, 41 N. E. (2) 710, 139 Ohio St. 622. The Turnverein was not exempt as a public institution of learning or as an institution used exclusively for charitable purposes, though it was a non-profit corporation engaged in social and athletic activities and though some of its work was incidentally charitable and helpful to public learning.

Alumni Ass'n of Delta Chapter of Zeta Psi Fraternity v. City of New Brunswick, 26 A. (2) 556, 20 N. J. Misc. 275. Property used for the purposes of a college fraternity is exempt under the statute extending exemption to fraternal organizations generally and the provision excluding college fraternities is unconstitutional. It is not necessary that the use should benefit the public generally, but it suffices that the property is used in the work and for the purpose of the fraternal organization and that the latter is non-profit.

Woman's Club of Little Falls v. Township of Little Falls, 26 A. (2) 739, 20 N. J. Misc. 278. When the property of any body of men, women, or both, is used for mutual assistance and not for pecuniary profit, it is exempt, and it is not necessary to show that there arises from it any benefit to the public generally except such as is incidental to the activities of the organization. A woman's club, therefore, which was organized for and engaged in activities designed to foster the social, intellectual and cultural improvement of the members was a fraternal organization within the meaning of the statute and exempt from taxation.

Cemeteries

Manchik v. Pinelawn Cemetery, 34 N. Y. S. (2) 366, denying reargument 32 N. Y. S. (2) 976, 263 App. Div. 961, affirming 33 N. Y. S. (2) 714. The record did not show that the lots owned by the cemetery were held for a public purpose and hence the latter were not exempt from taxation.

Consistory of Congregation of Paramus v. Township of Ridgewood, 25 A. (2) 199, 20 N. J. Misc. 125. The consistory owned a 35-acre tract used as a cemetery. It also owned a 7-acre tract on the opposite side of the highway. On the latter was located a parsonage and a building occupied as a dwelling by the cemetery superintendent and as an office for the preservation of the cemetery records. Further, the consistory had the latter tract mapped for hypothetical cemetery plots, but no burials were ever made on it and plotting was prompted by questions of valuation attendant on the construction of the highway. Neither the 7-acre tract nor the portion of the building serving as cemetery office could be held to be exempt from taxation.

Township of Saddle River v. Slavonian Catholic Church of the Assumption of Passaic, 24 A. (2) 398, 20 N. J. Misc. 92. Cemetery

lands are exempt only when in actual or in reasonably proposed use for cemetery purposes. The church involved in the case had purchased two contiguous segments of real property. One was improved for cemetery use; the other was brush and swampland. The former had been in use for burial purposes for thirty-six years. When it was proposed to assess the latter segment some token burials were made in it. However, no municipal permit had been obtained, as required by statute, for the use of the latter segment for cemetery purposes. At the present rate of burial, the improved segment is sufficient to serve burial requirements for centuries. The unimproved segment was therefore held not to be exempt from taxation.

San Gabriel Cemetery Ass'n v. Los Angeles County, 122 P. (2) 330. A cemetery association sold lots at a price greater than cost, but the selling price included expenses incident to the making of the place salable. Further, no part of the operating surplus of the association was distributed to stockholders or members of the association, but was used to buy more land, to employ salesmen and good will representatives, to advertise and to keep the cemetery in repair. It was held that the lots sold at the higher price were not sold at a profit within the constitutional provision regulating the taxation of cemeteries. There the word, profit, means not the financial benefit that accrues to the cemetery corporation through the sale of burial space at a price in excess of its costs, provided that the gain is used for the upkeep of the cemetery. It means, on the contrary, net earnings, the benefit of which accrue directly or indirectly to stockholders or members of the corporation.

Pomona Cemetery Ass'n v. Board of Sup'rs of Los Angeles County, 122 P. (2) 327. Unsold lots, niches, and crypts were held to be exempt under a Statute providing that all property used or held exclusively for the burial of the human dead or for the care, maintenance or upkeep of the property, except such as is used or held for profit, is to be exempt from taxation. It is immaterial whether the property is real, personal, or mixed. It need not be transferred to a person who will devote the property to that purpose in order to fulfill the requirement that it be used exclusively for the purposes indicated.

Rental as Fatal

Morris Grange, No. 105, Patrons of Husbandry, v. Township of Parsippany-Troy Hills, 24 A. (2) 807, 20 N. J. Misc. 99. This was a case in which a fraternal organization conducted an annual agricultural fair on its property through a subsidiary association which charged admission, and granted concessions for a fee. The pecuniary profit thus derived was sufficient to withdraw from the association the exemption from taxation which it might otherwise have enjoyed under the statute.

Morristown Firemen's Relief Assn' v. Town of Morristown, 25 A. (2) 28, 20 N. J. Misc. 113. Exemptions are intended to be granted only when the property is used directly for charitable, educational, religious, and fraternal purposes, and in the sense in which the property is suitable for use for such purposes. Consequently realty acquired by the firemen's relief association involved in this case through the foreclosure of mortgage loans and rented by the association to tenants as dwellings could not be considered exempt from taxation.

Sparrow v. Beaufort County, 19 S. E. (2) 861, 221 N. C. 222. A lot was devised to a church for the support of an evangelist. A building was erected on it and rented. The proceeds of the rental were used in large part for the payment of monthly installments on loan made for the purpose of erecting the building and for the payment of fire insurance premiums, though the balance was devoted to the support of an evangelist. It was held that the building was subject to *ad valorem* taxation.

Private Gain as Fatal

Calais Hospital v. City of Calais, 24 A. (2) 489 (Me.). Though a hospital which was organized to maintain a nurses' training school and nurses' home had not yet established these institutions, it could nevertheless qualify for exemption from taxation. The owner conveyed a private hospital with its equipment to a charitable institution incorporated without capital stock and with no provision for the payment of dividends, but on the contrary for recognized charitable purposes. The conveyance included certain bills receivable. On the other hand, the hospital gave the owner a mortgage payable in installments. Later, the hospital paid, in addition to the amounts regularly due as mortgage payments, an additional amount equal to

that collected on the bills receivable. The court held that this payment did not indicate that the hospital was conducted on a profit basis, since the source from which it was derived was not current income. Further, the use of a room in the hospital by the treasurer and manager as his headquarters in connection with service to the institution and in addition in connection with his own private medical practice was not fatal to the general charitable purpose of the institution, including this room within its dominant character.

State v. Wilmar Hospital, 2 N.W. (2) 564 (Minn.). Property which is owned by a corporation, which though organized as a public charity, is subject to private control and is devoted to substantial use for private profit, is not exempt. Such use is a matter of fact, and not of law; and so is the question of ownership. The mere change of ownership which transforms a corporation not exempt into one that would seem to qualify for exemption is not sufficient to accomplish the latter effect unless a change also occurs in the purposes for which the property is used. Consequently, in a case of this kind where the owners of a hospital corporation formed a new corporation as a public charity to take over the former hospital, but where the new corporation operated the hospital substantially as previously, charging fees of all patients according to a schedule, even though it made no effort to collect fees for services to indigent patients, the new corporation was not entitled to exemption.

In re Farmers' Union Hospital Ass'n of Elk City, 126 P. (2) 244 (Okl.). The mere fact that a profit is realized from the operation of a hospital does not condemn the institution as non-charitable or non-benevolent, but rather the fact that private advantage accrues to the organizers and supporters of the institution. On the other hand, the court was not bound by the enumeration of specified powers in the charter which would have determined the character of the institution, but was justified in examining the manner in which the hospital was conducted. Consequently where it appeared that a hospital was operated by an association primarily for the benefit of its members, although it received non-members at a higher rate than members, and that the institution generally made an annual profit which was used to increase its facilities and to reduce the cost of service to its members in the following year, it was not proved that the hospital was entitled to exemption.

Benton County v. Allen, 133 P. (2) 991 (Or.). Hospitals are not inherently public charities and consequently are not inherently entitled to exemption from taxation. Though the articles of incorporation offer *prima facie* evidence of the character of a corporation as a charitable institution, they can be rebutted by evidence that in fact the corporation has failed to comply with the articles. In this case a hospital corporation, organized for profit, was operated at a loss for a time. Then the stockholders organized a new corporation ostensibly for charitable purposes. They conveyed the property of the old corporation to the new one, subject to a first mortgage, and took a second mortgage and interest-bearing bonds in an amount equal to the par value of the stock. The new corporation then operated at a profit which was applied to the reduction of the first mortgage indebtedness. Its property under the circumstances was held not to be entitled to exemption.

Prairie du Chien Sanitarium Co. v. City of Prairie du Chien, 7 N.W. (2) 832, 242 Wis. 262. The fact that a hospital receives and is dependent on donations and that a fair number of charity patients is accepted are indications that it is a charitable institution entitled to exemption. The articles of incorporation are not controlling in determining its character. But an important test is to examine whether the members of the association render services without compensation. In this case, a hospital was maintained primarily for the greater convenience and profit of the managing physicians in the practice of their profession. The physicians received no salary. But they occupied their offices in the hospital rent-free and were entitled to one meal a day. Both concessions were granted in return for their activity in supervising the hospital. Moreover, the hospital cared for municipal and county patients, comprising about thirty per cent of the entire number of patients hospitalized, at a contract price that was less than cost. Nevertheless, it was held that the hospital was not a charitable institution entitled to exemption.

Charitable Use of Income Not Sufficient

State ex rel. Beeler v. City of Nashville, 157 S.W. (2) 839. Property belonging to a religious, charitable, scientific or educational institution is exempt only if used exclusively for carrying out one or more of the purposes of the institution. But the property in which

funds of the institution are invested is not exempt even though the income is used exclusively for carrying on the institution.

Incorporated Trustees of Gospel Worker Soc. v. Evatt, 42 N.E. (2) 900, 140 Ohio St. 185. Property is not exempt unless used exclusively for purposes indicated under constitutional and statutory provisions; and the test is the present use of the property rather than the ultimate use of proceeds received. In this case, 71.7% of the total cubage of a building was used for the purpose of housing a printing machine, printing equipment, as well as the offices and warehouses used in publishing religious papers from which net sales amounted to $376,292.07 for the year. After paying the living expenses of the workers and the expenses involved in operation, the society used the balance for church purposes. The Board of Tax Appeals decided that the property was not exempt and this decision was upheld.

Hairenik Ass'n v. City of Boston, 47 N.E. (2) 9. Exemption on the ground that a company is a benevolent or charitable institution must be determined from the declared purpose of the company, the work done by it and the character of the occupancy. The occupation required is occupation directly aimed at the carrying out of the charitable purpose. Therefore, occupation for profit is fatal, even if the profit is used for charitable purposes.

State ex rel. Cragor Co. v. Doss, 8 So. (2) 15 (Fla.). The right to exemption is determined by the use of property and not by the character of the corporation which owns it. When property is owned by a charitable corporation and part of it is used for purposes of the association and part for commercial purposes or the making of profit, if severable that portion used by the association may be exempted, while that part used for profit may not be; and if taxes on the taxable portion are not paid and sale for non-payment becomes necessary, the entire property may be sold. However, if the rentals are used for municipal, educational, literary, scientific, religious, or charitable purposes, the property is exempt from all state, county, and municipal taxes, except in the case when less than twenty-five per cent of the property is used by the corporation. In this case, buildings belonging to trustees for a fraternal beneficial organization and an unincorporated fraternal association were held to be exempt because the buildings were occupied and used for the purposes for which the organization and the association were organ-

ized, and not more than seventy-five per cent of the floor space was rented and rents were used for charitable and fraternal purposes of the owners.

Wehrle Foundation v. Evatt, 49 N.E. (2) 52, 141 Ohio St. 467. A statute exempting property belonging to institutions used exclusively for charitable purposes exempts the property and not the institution, but it exempts real and personal property, provided the property is used exclusively for charitable purposes. But property that is used to produce income to be used exclusively for charitable purposes is not exempt; the test is the present use of the property rather than the ultimate use of the proceeds. Therefore, personal property is not exempt in the case where the proceeds derived from it were given by a charitable foundation owning the property to organizations operated for religious, charitable, scientific, literary or educational purpose and for the prevention of cruelty to animals.

Use and Occupation

East Cleveland Post No. 1500, Veterans of Foreign Wars v. Board of Tax Appeals, 41 N.E. (2) 242, 139 Ohio St. 554. A war veterans' post maintained a canteen in a building on its land to promote friendship and sociability among its members. The post was a non-profit corporation organized for fraternal purposes and permitted the use without a charge of a meeting room over the canteen by its ladies' auxiliary, by parent-teacher associations, and by the community. Nevertheless, its property was not used exclusively for charitable purposes within the statute and was not exempt.

East End Hospital v. Evatt, 41 N.E. (2) 569, 139 Ohio St. 608. The use of property exclusively for charitable purposes is the criterion of the exemption of the property from taxation.

Girls Friendly Soc. of Pennsylvania v. City of Cape May, 24 A. (2) 410, 20 N. J. Misc. 65. A building was not exempt though it was owned by a corporation and maintained as a summer boarding home for women, some of whom were accommodated without charge, because the building was also used for other purposes which were not within the owner's certificate of incorporation which indicated that owner's purpose was to provide health and recreational facilities for women.

Trustees of Rutgers College v. Piscataway Tp., 25 A. (2) 248, 20 N. J. Misc. 127. Though the statute which exempted colleges was

changed in its language to read that buildings actually used for colleges were exempt, it was held that it was not the legislative intent to limit the exemption to structures actually and exclusively used for the purpose of instruction and to exclude structures having only an incidental connection with colleges and primarily used for the private purposes of individuals associated with the college. Therefore, a building acquired by college trustees for use by the college president as a dwelling, for a meeting place for the official meetings of the faculty, the deans, the students and the administrative personnel, and for the entertainment of official guests of the college, was dedicated primarily to the interests of the college and was exempt. So were 5 A. of the adjacent 11 A. tract of land under the statute which exempted 5 A. of land on which the college buildings were erected, if necessary for the fair enjoyment of the buildings.

Osteopathic Hospital of Maine v. Inhabitants of City of Portland, 26 A. (2) 641. The actual appropriation of property to tax-exempt uses rather than the physical use on the exact date of assessment determines exemption or non-exemption. If the property is not used at all for alien purposes, examination must be made to discover whether the property was used for the institution's own purposes. This may be established by inspecting the incidental uses to which it has been devoted as well as by proving the actual appropriation of the property to the purposes of the institution and the definite intention of the institution to broaden the scope of its use of the property in the future. Thus it may contravene any implication of tax evasion. In this case, the property was exempt where it was a lot of approximately 2½ A. consisting of wooded pine grove and some vacant land which was acquired by the hospital together with the tract containing the buildings which were in use. The unused land was appropriated to use for the intended erection of additional buildings. Its only actual use was to serve as a park for the walks of nurses and patients, with chairs scattered about for their convenience.

Aultman Hospital Ass'n v. Evatt, 42 N.E. (2) 646, 140 Ohio St. 114. Property owned by a non-profit hospital association, located about two blocks from the hospital proper and used exclusively as a home for student nurses, was held to be used exclusively for charitable purposes so as to justify its exemption.

Society of Cincinnati v. Exeter, 31 A. (2) 52 (N. H.). It is of the essence of a privately organized public charity termed in the

law as a charitable trust that it holds property in trust for the public benefit, to be devoted to purposes beneficial to the community, implying a fiduciary relationship enforceable by some officer in behalf of the State. Groups formed by close ties of blood or association, though constituting a section of the public, if beneficiaries of a trust, do not make that trust a charitable trust but rather a private one. Moreover, that property which is said to be devoted to a charitable trust must be so definitely designated as falling under the trust that the latter can be enforced by attaching the property. Now the Society of the Cincinnati of the State of New Hampshire was organized to keep alive among the officers of the New Hampshire Continental Army and their descendants in the community at large, the patriotic spirit of the officers. It moved an old building of historic interest on to its realty, partially restored the building, and had plans to restore it further in the future and to place in it furnishings of the revolutionary period when and if the funds for that purpose became available. The realty was held by the court not to be occupied by the Society of the Cincinnati for a charitable purpose. Indeed, the Society was not a public charity inasmuch as it was not mentioned by the legislature when it named other organizations devoted to the promotion of patriotism and benevolence. The fact that the Society used the building three times a year when the Society's standing committee met to approve grants of aid from the Society's funds was immaterial, since the charitable use must be more than trivial or negligible to justify exemption.

Title as Necessary

West Ridgelaw Cemetery v. City of Clifton, 26 A. (2) 262, 20 N. J. Misc. 399. In this case, a business corporation assigned all its title and interest in cemetery lands to an incorporated rural cemetery association before the tax assessment date, and on this date the cemetery association was actively in control of the lands and operating the cemetery. The lands were exempt from taxation, though the vendor retained the bare legal title.

Repeal of Special Exemption

Trustees of Phillips Exeter Academy v. Exeter, 27 A. (2) 569, 90 N.H. 472. A general act to exempt property which provides for the repeal of all special acts exempting similar property was intended by the legislature to repeal in its entirety the tax-exemption clause of the charter of the academy involved in the case, insofar as the

legislature had constitutional power, absorbing all special exemptions within the scope of the exemption granted by it and affecting all educational institutions alike. It did not amount to the impairment of contract as forbidden by the Federal Constitution.

INHERITANCE TAX ON MASS STIPENDS

A testatrix [1] bequeathed stipulated sums to a named trustee, " in trust, however, for the uses and purposes following, to-wit: To hold, manage, control, invest and reinvest the same, and out of the income and principal thereof to pay " to certain designated pastors of named Catholic churches stipulated minimum amounts per week, some " for the purpose of singing high masses," and others " for the purpose of saying low masses," for the souls of the testatrix and of designated relatives.

A question arose as to the liability of these bequests to the inheritance tax, under a statute levying such a tax " upon the succession to any property passing, in trust or otherwise, to or for the use of a person, institution or corporation, . . . when the succession is by will or by the intestate laws of this state . . ."

The court held the property taxable, saying:

> " We see here a passing of property to M. James Roche, in possession as trustee, and to the pastor of the specified church, in enjoyment present and future as cestui que trust—clearly a ' succession ' within the plain wording of the statute. That there is a succession ' in trust . . . for the use of a person ' as defined by the levying statute is clear, since, by the language of the will, the pastor saying the masses receives the donated funds for his use. Sufficiently designated to enable the trustee to perform his trust and the cestui to enforce performance, the pastor of the specified church is expressly identified as the ' person ' to receive the property."

The court further held the property not exempt under statutory provisions in favor of gifts " to or for the use of an institution for purposes only of public charity, carried on in whole or in substantial part within this state," and said

> " But this exception is of no avail because, as is specifically admitted, the money expended for masses goes as a gratuity for the personal use of the priest who says the masses."

[1] *In re Reilly's Estate* (*Roche v. Department of Taxation*), 138 Ohio St. 145; 33 N. E. (2) 987.

The court declined to accept the argument that " in order to receive the moneys left by the testatrix, the designated pastor must say the required masses and that the saying of masses involves the performance of services and expenditures for necessary supplies," and that hence " there is no taxability because there is no gift—that the money is paid out for services rendered," saying it misconstrued the operation and effect of the taxing statute, and that—

> " The tax is levied on successions by will of every kind, unless specifically exempted, and such a succession need not necessarily be a gift. There is no qualification in the statute exempting a succession, otherwise taxable, because the recipient fails to realize 100 per cent benefit from the succession."

The court distinguished a bequest for masses, as in the instant case, from a mere direction to the executor to expend money for masses, as to which there is no tax liability, (citing *Tax Commissioner v. Gerdeman,* unreported, No. 200, Court of Appeals, Putnam County, Ohio), saying:

> " Considering a mere direction to an executor, where does one find any succession—any passing of property by will—or any right in any particular person to receive property from the decedent's estate? There is merely the authorization to an executor to make an expenditure from the assets in his hands, before the division and passing of the property of the estate. There is thus no succession to any property upon which the tax may fall."

And consequently the court held that the testamentary provisions in the instant case were bequests, constituting statutory " successions ", and not mere directions to the executor to expend funds; and liable for inheritance tax.

The brief filed in this case by the executor, before the Supreme Court of Ohio, contains verbatim this unreported decision of the Probate Court, holding the provisions to constitute a taxable succession, and of the Court of Appeals, affirming the lower court, but without a written opinion other than a dissent.

The opinion of the Probate Court cites and quotes from the *Weekly Law Bulletin*[2] a decision of the Probate Court of Hamilton County, Ohio, holding that bequests of $300.00 " for 300 masses, was a beneficial estate to the priest who will say the masses, and is therefore liable to the Collateral Inheritance Tax."

[2] December 27, 1897, bound in 39 Ohio Law Bulletin, 304.

It also refers to and quotes at length from *In re Estate of Emma Muenich* [3] as being identical with the instant case, in which the testatrix bequeathed to the pastors of named Catholic churches stipulated amounts " for holy masses for the repose of my soul " and of the souls of designated relatives, and in which the bequests were held taxable successions.

It refers further to and quotes at length from *Tax Commissioner v. Gerdeman,* in which the will provided, " I direct and demand that " a stipulated sum " be expended for holy masses," etc., as to which the Probate Court held that the amount did not constitute a taxable succession, but rather a proper deduction in determining the value of the estate, while the Court of Appeals in affirming the decision stated as its reason " that the direction for the saying of masses does not constitute a succession within the purview " of the statute.

It quotes from the brief of the estate in the Gerdeman case, that " no designated person having any right to the payment to him of this directed expenditure, there is in law no succession or passing of property under the will," and states that this argument was accepted by the Court of Appeals in that case.

It refers to *Dempsey, Executrix, v. Christ the King Church,* [4] which was a petition to construe a will in which the testatrix provided that the income from her property should be equally divided between two named persons, " for masses to be said at my present parish church," and in which the question was " whether . . . a trust is created for the saying of masses and the income . . . may be used for said purpose," but in which the court " merely found that [testatrix] by the terms of her will, created a valid charitable trust for the saying of masses."

The Probate Court in the instant case pointed out that the court in the Dempsey case " did not find, however, that the trust so created was ' for purposes only of public charity'."

The dissenting opinion in the instant case was based on the premise that " the right to demand possession of said funds entirely depended upon the performance of the services of saying the masses," and that, " if the priest had no right to demand the possession of said funds until the performance of the services required in the say-

[3] Unreported—Probate Court, Cuyahoga County, Ohio (1920).

[4] Unreported—Court of Appeals, Cuyahoga County, Ohio.

ing of the mass, that there is no ' succession ' of title to said fund as a gift," and urged freedom from tax liability.

The Ohio Supreme Court, in the instant case, referred to Vol. I, *Opinions of Attorney General* (of Ohio), (1922), 8, No. 2780, quoted in the brief of the executor in the instant case, in substance, that where the testator directs his executor to have masses said for the repose of his soul, the expenditures thereunder, if not extravagant, are a permissible deduction from the personal estate for inheritance tax purposes, as comparable to a direction for funeral services, or a cemetery lot, monument or mausoleum.

THE SUPREME COURT OF THE UNITED STATES AND INTERSTATE DIVORCE

The decision of the Supreme Court of the United States,[1] remanding to the consideration of the Supreme Court of North Carolina a conviction for bigamy, and in doing so requiring that full faith and credit be accorded by one State to another when the latter has granted a divorce after constructive notice to the defendant, has provoked the discussion of the antecedents and consequences of this somewhat epochal decision. Several of the law journals have opened their pages to a consideration of its implications.

In this case,[2] a man and a woman had left their spouses in North Carolina and gone to Nevada where they established a six weeks' residence, and obtained a Nevada divorce without personal service on the spouses left behind and without the appearance of the latter, though they had actual notice that the divorce cases were pending. The two plaintiffs were married in Nevada and returned to North Carolina. There they were convicted of bigamous cohabitation and the Supreme Court of North Carolina upheld the conviction. The case was brought before the Supreme Court of the United States on certiorari.

In the course of the opinion, Justice Douglas, who wrote it, said that the opinion of the Supreme Court of the United States in *Haddock v. Haddock* [3] was now overruled. Of course, this statement is of no greater weight than other *dicta* and it is challenged by Walter

[1] *Williams and Hendrix v. North Carolina,* 63 Sup. Ct. 207.

[2] Cf. The Jurist, II (1942), 429.

[3] 201 U. S. 562.

Wheeler Cook in the *Indiana Law Journal.*[4] He holds that the point in issue in the latter case was the right of the injured spouse to sue under New York law for economic support after her husband had obtained a divorce in Connecticut. True, certain features of the present case were interwoven with the circumstances of that case; but Professor Cook holds that the point mentioned was the only one determined, and that the decision in *Haddock v. Haddock* still seems supportable as to that point, in spite of the present decision. His view is that one's attention may be distracted by the similarity of circumstances in the two cases because in the earlier case, the injured wife had never been domiciled in Connecticut, and had never been subjected to the personal jurisdiction of the Connecticut court, while the husband had obtained a *bona fide* domicile. There, however, the question was not whether the marriage was dissolved, but whether the alleged dissolution could be put in as a defense against the later suit of the wife in a court in New York for separation from bed and board and alimony, after she had obtained personal service on her husband. But the question did not concern the right of the husband to acquire another wife. The question was whether his former wife had a right to sue him for support. The sweeping language of Justice Douglas, it is true, would seem to indicate that after the present decision the State of the last marital domicile of the parties, which is still the State of the domicile of the wife, is unable to protect the economic rights of the wife who does not appear in the divorce proceedings. Nevertheless, it is considered to be too wide an application of the decision. It may yet be modified so that the economic rights of the wife will be ruled by the decision in *Haddock v. Haddock.*

Justice Douglas further said in his opinion that the question of *bona fide* domicile was not in issue. On the other hand, Lorenzen, writing in the *Yale Law Journal*,[5] believes that Justice Jackson, dissenting, implies that the domicile was not *bona fide* in holding that the injured spouses should not be deprived of their rights by the action of *another* State having a different divorce policy. For a State actually acquires, under the view of practically all courts, jurisdiction over the marital status through domicile. And if domicile is *bona fide,* jurisdiction over the status is assumed. Obviously,

[4] "Is *Haddock v. Haddock* Overruled?"—XVIII (1943), 165-192.

[5] "*Haddock v. Haddock* Overruled"—LII (1943), 341-354.

a State that had no jurisdiction over the status could not deprive the injured spouses of their rights in their State of domicile.

The majority opinion was based further on the view that the residence in Nevada of the two plaintiffs was not collusive, but *bona fide* and for an indefinite permanent period. It thus contravened the opinion of the trial court in North Carolina which had charged the jury that the defendants (i.e., the plaintiffs in the divorce proceedings) had the burden of proof in establishing the *bona fide* character of their residence in Nevada for the required time.

Under the present ruling, then, if it could be established that the residence was not *bona fide*, it would seem that North Carolina would not be obliged to give full faith and credit to the divorce granted in Nevada. Suppose, then, that when the case goes back to the North Carolina jurisdiction, the court does find that the lack of a *bona fide* domicile is adequately proved. Is it within its competence in finding this adversely to the State which, in granting the divorce, decreed that *bona fide* domicile actually existed? It would seem that it is.

The matter of serving the defendant could be further clarified and obtained by an Act of Congress providing for a nation-wide service so that both parties would be subject personally to the jurisdiction of the court of the plaintiff's *bona fide* domicile if the defendant is personally served anywhere within the jurisdiction of the United States. Cook maintains that Congress has power to enact such legislation under the full faith and credit clause of the Constitution. A simple provision of this kind would in his estimation be advisable rather than an extensive uniform divorce law, for which, he says, the nation is not yet ready. At best, such a law would have to be a compromise, and an occasion of those evils which inevitably arise when the law of divorce is out of touch with the prevailing sentiment in the community. This view is, of course, entirely consonant with the positivistic attitude towards law, under which law follows the will of the masses independently of any absolute standards by which the masses are directed according to reason.

The possibility of refusal of full faith and credit to a divorce granted by a State in which mere residence and not a *bona fide* domicile had been established has caused Lorenzen to suggest that divorce jurisdiction be based on the jurisdiction of the person rather than on the jurisdiction over the status. Even more insistent on

this plan is Karl M. Rodman, writing in the *California Law Review*.[6] The latter finds no solid objection against it and no solid argument for the present method of obtaining jurisdiction. He notes that the Supreme Court has held that true domicile is not necessary to render one subject to taxation under the law of the State of his residence. Consequently, he thinks that a divorce granted on the basis of residence alone would not constitute a denial of due process as to the validity of the divorce within the State of the forum of the divorce. Nor have courts been disturbed in other matters by the fact that citizens travel from State to State to evade the harsh statutes of the State of their origin.

The jurisdiction *in personam* would, of course, require actual residence of the plaintiff in the State where the suit is entered. It is held that the Supreme Court should retain some control over the period of residence, requiring a residence, for instance, of six months. It seems unfair that after the married parties have had a residence (not to mention a domicile) of twenty years in one State, and of only six weeks in another State, both States should be accorded equal jurisdiction and equal interest in the marital relation.[7] It is further maintained that mere casual residence, much less the residence of a tourist, should not be held as sufficient.[8]

Besides the residence on the part of the plaintiff in the State where the suit is entered, under the present decision it would seem certain that constructive notice given the other spouse, suffices for the personal jurisdiction of the court of that State over both the plaintiff and the defendant. Of course, as yet, mere residence does not suffice, but domicile is required.

MISCELLANEOUS

Charitable Institutions Subject to WLB

The War Labor Board, by a vote of six to three, the industry members registering the dissent, has found that a dispute between the Brooklyn Central Young Men's Christian Association and the

[6] "The Last of Mr. and Mrs. Haddock?"—XXXI (1943), 167-187. Cf. also Straborn and Reiblich, "The *Haddock* Case Overruled—The Future of Interstate Divorce"—*Maryland Law Review*, VII (1942), 29-71.

[7] Lorenzen, *loc. cit.*

[8] Rodman, *loc. cit.*

Social Service Employes' Union, an affiliate of the CIO United Office and Professional Workers, involving the questions of the recognition of the union and the right to bargain collectively, is subject to its jurisdiction. The YMCA argued at a public hearing against this jurisdiction on the ground that charitable organizations should not be bound to bargain collectively, that the New York Labor Relations Act exempts charitable organizations, and that it engages in purely intra-state commerce. The Board was of the opinion that even charitable organizations must conform to the wage stabilization policies of the WLB and to the Constitution of the State of New York recognizing the right of all employes to collective bargaining. It had previously ordered companies engaged in purely intra-state commerce to bargain collectively. Nevertheless, the final disposition of the case was referred to the New York Regional War Labor Board.

Displaying the Flag

The chaplains in the armed forces of the United States have received instructions as to the displaying of the national and religious flags, from Brig. Gen. William R. Arnold, Chief of Chaplains. Inside the chancel, the religious flag is placed at the right side as seen by the congregation; and vice versa outside the chancel. In a hall, the national flag is placed at the speaker's right; if hung, it should be above and behind the speaker; if placed against a wall, with its staff crossing the staff of another flag, the national flag should be at the left as seen by the audience, its staff in front of the staff of the other flag. In bunting, the blue should be on top. When the national flag is placed on a casket, the blue field is placed at the head and over the left shoulder of the deceased. The flag should not be lowered into the grave. It should be folded by two members of the guard under the direction of a non-commissioned officer. It should be folded into a triangle so that the final fold will show three stars. It is given to the nearest relative of the deceased.

U. S. Subsidy to Charity

William F. Montavon, Director of the Legal Department of the National Catholic Welfare Conference, appearing before the Senate Committee on Education and Labor in the latter part of June, urged the amendment of pending legislation providing for the day-time care of children whose mothers are engaged in war work in order

to insure, as the Lanham Act does, that existing non-profit private agencies will be accorded a place of equality under the law. The amendments necessary were incorporated at the suggestion of Senator Danaher and appear in the bill as passed by the Senate.

Mr. Montavon also appeared at a meeting of the Senate Committee on Public Buildings and Grounds, in support of a bill which would authorize the appropriation of $200,000,000 for the Lanham Community Services Act, providing a procedure by which Federal funds can be channeled directly to State and community agencies, both public and private, rendering service during the war emergency. Attention was called to the expansion of Catholic hospitals and institutions made necessary by the war and to the fact that the funds, while helping them to meet this situation, would not interfere with the freedom of community agencies.

Released Time

Permissive "released time" for religious instruction on the request of the parents of the children on four days a month for a single period each day commences in the fall in California under the bill signed by Governor Warren. Two attempts to block the operation of the bill have been made. The first is through court action, which may delay the operation of the bill for years; the second is in the form of a petition seeking to refer the bill to a referendum vote by the people of California in the November elections.

Reviews

PRINCIPLES FOR PEACE; SELECTIONS FROM PAPAL DOCUMENTS, LEO XIII TO PIUS XII. Washington, D. C. National Catholic Welfare Conference; Milwaukee: Bruce. 894 pp. $7.50.

In the midst of the chaos of the " might-is-right " milieu, sponsored by the positivistic interpretation of law, the Popes of the last fifty years have ministered to the ills of nations as well as to those of individuals. Their historic, monumental service has been too impatiently resisted and rebuked by the very patient whose dying gasp should rather have uttered benedictions. Considering the fact that the charlatans, who by their malpractice have brought their victim to the brink of destruction, might follow the tactics of the two Italians, who through the University of Chicago Round Table of the Air and the *New Republic,* would blame the Pontiffs for the patient's death, it was highly imperative that a White Paper be issued, recording for posterity the true history of the Vatican's intervention. This was the need that compelled the hierarchy in the United States, acting through its Committee on the Pope's Peace Points, to gather from every source the prescriptions written by the illustrious successors of St. Peter and to publish them between two covers, a veritable pharmacopoeia for the manifold ailments of the patient who is sick unto death.

Refuting the philosophy that ignores the essentially directive element in law, this volume reinstates the claims of international law against both the nations that brutally display their contempt of it and the nations that glibly mouth their lip-service of it as defensive and offensive propaganda against their enemies. Its chronological arrangement of the universally significant documents, necessary to highlight the historic circumstances that evoked them, is subservient to a thorough topical index that renders expeditious for the student and the statesman the clarification of the individual issues that confront the builders of a lasting peace. A moment's glance through the topical index is adequate to instruct the un-

biased investigator that here is a biography of the natural law applicable to nations, that here is a plaintiff's brief asserting the rights of natural law before the bar of unbridled right, that here is the recorded Judgment of the Sponsor of the Eternal Law convicting the world of its violation. A note of tragedy hovers over the reading of the volume, as one is saddened by the reflection that the Custodians of the Deposit of Faith have been compelled by the agnosticism of their time to devote so great a share of their learning, not to a defense of the Faith, but to a defense of reason. For it is not the dogmas of Faith that have elicited the defense inherent in this volume, but the fundamental dictates of the natural law itself.

A debt of gratitude is due the Bishop's Committee, Most Rev. Samuel A. Stritch, D.D., Chairman, Most Rev. James H. Ryan, D.D., and Most Rev. Aloisius J. Muench, D.D., for the singular service it has rendered the Church and the world in the compilation of this volume. Surely no Catholic library and no Catholic rectory can be without it. Because of the greater need of the secular world, no public library can afford to deny it a welcome to its shelves. Indeed, wherever there is the evidence of learning that a library connotes, a place must be made for this compilation of the last and best word on the therapeutics essential to the rehabilitation of the world.

PERIODICALS

Domestic Relations

"Relationship by Affinity"—*Boston University Law Review,* XXII (1942), 401-431, 558-579. In the majority of the States, marriage is necessary to create the relation of affinity. However, common law marriage, but not incestuous marriage, suffices. Most States extend the impediment only to lineal ascendant or descendant of spouse, or spouse of one's own lineal ascendant or descendant.

Paul Sayre, "Awarding Custody of Children"—*University of Chicago Law Review,* IX (1942), 672-692. Custody means the immediate control of the child but is always something less than the sum total of the rights and duties of a parent, because a residuum of these always remains in the parent. Only the danger of delinquency justified the removal of a child from the custody of the father under the provisions of the common law. Now in practice, if not in theory, the best interests of the child are the controlling factor. Each case is determined on its own merits. Under local statutes, interested persons and law-enforcing agencies can take the child into the custody of the court with nothing more than due notice of a subsequent hearing for the determina-

tion of custody. The proceedings are in equity without a jury unless serious criminal offenses and older children are involved. Outside these cases, there is, in theory, no question of punishment and criminal statutes are not applied. The commitment of the child to the reformatory is itself meant to provide necessary guidance and welfare. There should always be required by the court, therefore, a description of the child's character and needs.

Compulsory Vaccination and Sterilization

Thomas Reed Powell, "Compulsory Vaccination and Sterilization: Constitutional Aspects"—*North Carolina Law Review,* XXI (1943), 253-265. The Fourteenth Amendment is the primary guide of the Supreme Court of the United States in the matter. The author views this as no guide at all. In *Jacobson v. Massachusetts,* 197 U. S. 11 (1905), the Supreme Court by a 7-2 decision sustained a compulsory vaccination law, rejecting the evidence of the defendant as based on a dispute between two theories in which the Court took judicial cognizance of the fact that the theory favoring vaccination accords with common belief and that the State is competent to choose between theories. In 1927, the Supreme Court upheld a sterilization statute in an 8-1 decision (*Buck v. Bell,* 274 U. S. 200), but in 1942 it condemned another (*Skinner v. Oklahoma,* 316 U. S. 535). The former statute was applicable only to mental defectives confined in institutions and provided for a proceeding in which notice was essential, as well as a hearing and the right of appeal. It was not class legislation, as the classification (inmates) was reasonable. The latter statute was unconstitutional because of its discriminatory character; it was held to be a denial of the equal protection of the laws because it applied to triple offenders who commit larceny but not to those who commit embezzlement. Chief Justice Stone concurred on the sole ground that the statute gave no opportunity to the victim to show that his criminal tendencies were not inheritable, to which Justice Jackson agreed, adding assent also on the ground of its discriminatory character, and intimating that a constitutional issue would be present even in the absence of these two grounds. Justice Douglas pointed to the implicit dangers in the statute as a weapon against particular races or nationalities, intimating also his doubt as to the transmissibility of the criminal tendencies. The author of the article hopes that the latter decision will not prevent a sane public health program, even though it should intrude on privacy or usurp the right of self-determination.

Jurisprudence

John C. Ford, "The Fundamentals of Holmes' Juristic Philosophy"—*Fordham Law Review,* XI (1942), 255-278. No man has had a greater influence on the legal ethics of today than Justice Holmes. The article considers his views on the nature of law, of right, of morality, of truth, of man's place in the world. Holmes considers the essence of law to be physical force and by logical conclusion should hold that might makes legal right, with no absolute rights in opposition. He has no room for God, for will as a basis of moral obligation, for morality, for natural law, for absolute truth, for certainty in law. Man, he holds, is a means to an end, to be sacrificed by the State, if necessary.

Robert I. Gannon, "What Are We Really Fighting?"—*Fordham Law Review,* XI (1942), 249-254. It is atheism we are fighting. The rationalists abandoned Christ but not liberty, inalienable rights and human dignity. They forgot the logical conclusion of their atheistic premises. Japan in the sixteenth century was highminded, generous, devout; in the nineteenth century, the fruit of the German Universities is flowering within her. The same poison was brought back to our own country by professors and jurists who studied in Germany from 1880 to 1914.

William B. Munro, "Our Vanishing Government of Laws"—*California Law Review,* XXXI (1942), 49-58. Administration is now the substitute for legislation; administrative bodies are set up to act quickly in times when the masses clamor for the readjustment of the social pattern. A quasi-judicial temperament is a prime requisite in members of these bodies. Appointments, however, are largely determined by politics. The bodies sometimes set aside the guarantees of fair treatment, as for instance, the presumption of innocence, the right to a hearing, the right to the equal protection of the laws, and the prohibition of the dual role of prosecutor and judge. Remedies are to be sought in improvement of personnel rather than in improvement of procedure.

Walter B. Kennedy, "Law Reviews 'As Usual'"—*Fordham Law Review,* XII (1943), 50-61. Considers the task of law reviews in America in the world crisis. They should analyze society, government and legal institutes; they should examine the origin and source of all law and of American law in particular and determine whether we have deserted the juristic faith of the founders of the nation. It has almost been forgotten that American law was founded on belief in the Divine Law. It has been the fashion for a generation to divorce the Divine Law from positive law. Pragmatic jurisprudence, based on the clash of wants, and legal realism substitute a government of men for a government of law. The last step is being taken by the neo-realists who would abandon all law and reject even man-made law. There are signs, however, in current legal literature of a return to spiritual values in the political and legal orders.

International Law

"Non-Belligerency in International Law"—*Virginia Law Review,* XXIX (1942), 143-151. The beginnings of international law go back only four hundred years [sic]. At first it dealt with the relations of states at war. The neutrals were those who remained out of the war. But neutrality admitted of degrees and did not demand impartiality of treatment. Later, impartiality was required. The modern view in the League of Nations and the Pact of Paris reverts to the view which distinguished between aggression and self-defense. The Neutrality Act of 1935 abandoned national neutral rights; but a reversal of viewpoint has occurred and the Department of Justice holds aggression as illegal. Non-belligerency may find a place in international law as a sanction against aggressor nations.

Antonio S. de Bustamente y Sirven, "Unlawful Aggression and Defense"—*Tulane Law Review,* XVII (1942), 60-72. Only recently has aggression been a matter of controversy and of careful study by diplomats and writers on In-

ternational Public Law. This is due to the League of Nations and recent treaties. Illegitimate defense is overlooked. Controversy turns on point of whether definition of aggressor is possible. When aggression is legitimate, the defense ceases to be so.

Max Radin, "Martial Law and the State of Siege"—*California Law Review,* XXX (1942), 634-647. Deals with the "state of siege", the counterpart in France of martial law. It is not a condition in which law is temporarily abrogated but a legal institution, expressly authorized by the constitution and the various bills of rights which succeeded each other in France, and it is organized under this authority by a special statute. Though the constitution would seem to indicate that only the legislature can declare a constructive state of siege, it was often done by decree.

Constitutional Rights

"The Conscientious Objector in Law"—*Washington University Law Quarterly,* XXVII (1942), 565-577. In 1777 Virginia provided for a draft in default of raising a certain number of men; and this provision was never attacked in the courts. No exemption for objectors was contained in the Act of the United States at the time of the Civil War; the Act of the Confederacy did permit substitutes and exempted members of specified religious sects on the payment of five hundred dollars or the sending of a substitute. Attacks upon these acts were unsuccessful, the court holding that the Constitution provides no invariable rule for the raising of an army. The Selective Service Act of 1917 exempted conscientious objectors, subject to non-combat duty. The Selective Service Act of 1940 exempts them and sends them to camps, exacting a monthly stipend of thirty-five dollars. Courts will review the administrative hearing of a draft board passing on the privilege but only to determine whether the board had jurisdiction or gave a fair hearing. Congress has been held to have power to require of aliens seeking citizenship the oath to bear arms as a prerequisite. No rights were abridged when students were excluded from State universities when they refused to take military training compulsory on all male students attending them. All exemptions are privileges, and not rights, whether of conscientious objectors, war workers, or defectives.

L. Teller and E. M. Dodd, "Picketing and Free Speech"—*Harvard Law Review,* LVI (1943), 180-218, 513-540. Teller's original article was answered by Dodd, to which a reply was submitted by Teller. *Thornhill v. Alabama* (310 U. S. 88) was the first case which held picketing a constitutionally protected exercise of the right of free speech. *Carlson v. California* (310 U. S. 106), decided the same day, held another anti-picketing ordinance to be invalid. In both cases, workers rather than customers were affected by the picketing. A retail establishment was picketed in *A. F. L. v. Swing* (312 U. S. 321), in which the decision invalidated a State court injunction against picketing granted because it was carried on in the absence of a strike. Similar decision was handed down in *Bakery and Pastry Drivers and Helpers Local 802 v. Wohl* (315 U. S. 769). Teller holds that the activity involved in these cases was more than the exercise of freedom of communication; that it was

downright coercion. Dodd says that the State can not blanket all strikes as to the unlawfulness of their objective. Canvassing the Supreme Court's position, he points out that it had three alternatives: it could hold that picketing was identical with the constitutional right to engage in other forms of spoken or written communication, but this would have ignored the distinction; or recognize that picketing is free speech and constitutionally protected but subject to special limitations because it is free speech with something added; or finally it could reject the identity altogether and leave the States free to adopt any anti-picketing rules they chose. It seems right to Dodd that it should have adoped the mean between the two extremes.

Byron Price, "Censorship and Free Speech"—*Indiana Law Journal,* XVIII (1942), 17-22. The field of opinion and honest criticism lies beyond censorship and rests with statutes and law enforcement agencies under "due process" procedure. Censorship applies to communications entering and leaving the country and administers Codes of War Time Practices for the press and the radio, to withhold information of military value.

Roscoe Pound, "Civil Rights during and after the War"—*Tennessee Law Review,* XVII (1943), 706-723. War threatens the bill of rights and the fundamental legal constitutional doctrine of the separation of powers. War increases the tendency of the executive and of executive agencies to acquire power beyond their constitutional sphere. The present chief threat seems to lie against the freedom of speech and the freedom of the press. A revival of the seventeenth and eighteenth century ideas on libel is being suggested: making it libel to hold that there are no limitations on the power of the majority or on agencies established by the majority. The enemy knows that a ruling majority runs the war and derives no comfort from the criticism of a politically powerless minority. A further danger is apparent in the theory that lawyers are not to resist administrative absolutism.

Francis H. Heller, "A Turning Point for Religious Liberty"—*Virginia Law Review,* XXIX (1943), 440-459. The earliest case reported against Jehovah's Witnesses was in 1916. They ran afoul of the authorities by opposing the war effort of 1917-1918. Legislation in many States showed strong reaction against them in 1939-1941. Even the Supreme Court of the United States in *Minersville v. Gobitis* (310 U. S. 586) upheld in 1941 their obligation to the flag salute under a State statute. Author says that to refer the policy on religious liberty to the local legislature as in economic questions, makes religious liberty a local question and endangers minorities. He hopes for a successor to Justice Byrnes who will agree with the dissent in the Gobitis case. [The hope has been realized, of course, and the decision reversed. Cf. The Jurist, III (1943), 333, 504.]

V. W. Rotnem and F. G. Folsom, "Recent Restrictions upon Religious Liberty"—*American Political Science Review,* XXXVI (1942). The First Amendment to the Federal Constitution did not bind the States as to religious freedom, but the Fourteenth Amendment does. Jehovah's Witnesses have been the guinea pigs for the decisions of the Supreme Court for the last five years. The first decision involved a city ordinance of Griffin, Georgia, making it an offense to distribute leaflets and handbooks within the city limits without the permission of the city manager—*Lovell v. Griffin* (303 U. S. 444). The

Supreme Court held this ordinance to be unconstitutional under the guarantees of freedom of speech and freedom of the press under the Fourteenth Amendment. The next decision was rendered in *Schneider v. Irvington* (308 U. S. 147), which extended the rule to an ordinance of Irvington, N. J., requiring canvassers and peddlers to register with the chief of police and to secure a permit. *Cantwell v. Connecticut* (309 U. S. 626) ignored the State law requiring that before persons might solicit money for religious causes, they must first apply to the secretary of the local public welfare council who was to provide a certificate if he found the cause a religious one, and found that the authority to pass upon what was a religious cause was a restraint on the freedom of religion. Contrary opinions seem to be held in *Chaplinsky v. New Hampshire* (315 U. S. 568) in 1942, where it was maintained that fighting words are neither under the protection of the Constitution nor an exercise of religious liberty; and in *Cox v. New Hampshire* (312 U. S. 569), where a State statute prohibiting parades was upheld against those who carried signs in a procession on a busy intersection on a Saturday night. Reference is made also to *Minersville v. Gobitis* (310 U. S. 586), which involved the compulsory flag salute; and the decision rendered in June 1942 upholding statutes of towns in Alabama, Arkansas, and Arizona (62 Sup. Ct.) [Both these decisions have been reversed this year, 1943. Cf. The Jurist, III (1943), 333, 334, 503, 504.]

Chronicle

GENERAL

On August 22, Most Rev. Samuel A. Stritch, D.D., Archbishop of Chicago, preached at the opening of the annual national meeting of the Catholic Central Verein of America and the National Catholic Women's Union in the Cathedral of the Immaculate Conception, Springfield, Ill. Most Rev. Aloysius J. Muench, D.D., Bishop of Fargo, was the principal speaker at a civic forum in the afternoon. Both prelates are members of the Bishops' Committee on the Pope's Peace Points and both based their discourses on the Holy Father's peace program.

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The 61st annual meeting of the Knights of Columbus Supreme Council opened in Cleveland on August 17 with a Pontifical Mass celebrated by Most Rev. Edward F. Hoban, D.D., Coadjutor of Cleveland. The sermon was preached by Most Rev. Charles L. Nelligan, D.D., Bishop of Pembroke and Military Ordinary of the Canadian Armed Forces. Francis P. Matthews was reelected Supreme Knight.

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The Catholic Daughters of America held their 20th biennial convention in Cleveland during the middle of July. The convention was opened with a Pontifical Mass celebrated by Most Rev. Edward F. Hoban, D.D., Coadjutor Bishop of Cleveland, and the sermon was preached by Most Rev. William J. Hafey, D.D., Bishop of Scranton. Mary C. Duffy was reelected Regent.

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In mid-August, the Catholic Total Abstinence Union of America, held its 72nd annual convention in Philadelphia and was welcomed by His Eminence, Dennis Cardinal Dougherty.

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The Holy Childhood Association celebrated its first centenary on June 21. It has an enrollment of 8,000,000 children. It was founded by Bishop Charles de Forbin-Janson, of Nancy, France. It was introduced into the United States through New Orleans in 1846. In 1890, Pittsburgh became the Central Bureau, and fifty years ago, the entire work was entrusted to the Holy Ghost Fathers.

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On August 15, Most Rev. George L. Leech, D.D., Bishop of Harrisburg, celebrated Pontifical Mass in St. Patrick's Cathedral, closing a series of spiritual exercises observing the diamond jubilee of the Diocese, which had opened on March 17 with a Mass of Thanksgiving in the Cathedral and all parish churches.

Most Rev. Miguel de Andrea, Titular Bishop of Temnus, preached to the Federation of Catholic Associations of Employes at a field Mass on the Plaza del Congreso, Buenos Aires, at which Most Rev. Annunciado Serafini, Bishop of Mercedes, pontificated in the presence of Most Rev. Giuseppe Fietta, Papal Nuncio to Argentina. The Provisional President, Pedro P. Ramirez, assisted with his Cabinet.

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A seminar for leaders working among the Spanish-speaking people of the West and Southwest was held in mid-July in San Antonio, under the auspices of the Social Action Department of the National Catholic Welfare Conference.

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The St. Thomas More Society held a luncheon meeting in Chicago on August 26. It meets three times a year. It is a non-denominational group of lawyers which aims at making known the life and achievements of St. Thomas. Brendan F. Brown, J.U.D., is president.

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Most Rev. Edmund F. Gibbons, D.D., Bishop of Albany, celebrated the golden jubilee of his ordination.

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Most Rev. J. C. McGuigan, D.D., Archbishop of Toronto, celebrated the golden jubilee of his ordination.

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Most Rev. Thomas Emmet, S.J., D.D., Vicar Apostolic of Jamaica, celebrated the golden jubilee of his membership in the Society.

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His Eminence, Cardinal Arthur Hinsley, who died March 17, has bequeathed his estate ($5,350.00) in trust for the advancement of the Catholic religion in "my diocese of Westminster".

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Very Rev. John F. Fenlon, S.S., President of St. Mary's Seminary, Baltimore, and Provincial of the Society of St. Sulpice in the United States, died on July 31, at the age of 70.

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Most Rev. Mathias C. Lenihan, D.D., Titular Archbishop of Preslavo and retired Bishop of Great Falls, died August 19, at the age of 88.

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Most Rev. Joseph N. Dinand, S.J., Titular Bishop of Selinus and former Vicar Apostolic of Jamaica, died on July 29.

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On August 27, Most Rev. Jose Gaspar de Affonseca, Archbishop of Sao Paulo, Brazil, and his secretary, Msgr. Alberto Teixeira Pequeno, were killed in an airplane crash in Rio de Janeiro Bay.

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Most Rev. Georges Prudente Bruley des Varannes died the latter part of May. He had been Bishop of Monaco from 1920 to 1924.

Most Rev. Edward O'Rourke, first Bishop of Danzig, died on June 27 at Rome. He was named Bishop of Riga in 1918 and Bishop of Danzig in 1926; he resigned in 1938, becoming Titular Bishop of Sofene.

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Most Rev. Edward Mulhern, Bishop of Dromore, died at Newry at the age of 79.

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Most Rev. Joao Antonio Pimenta, Bishop of Monte Claros, Brazil, died at the age of 84.

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Most Rev. Luigi Olivares, Bishop of Nepi and Sutri, died after twenty-seven years in that See.

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The deaths of the following Bishops have been announced: Most Rev. Joseph Bach, Titular Bishop of Eriza, and former Vicar Apostolic of the Gilbert Islands; Most Rev. Alexander Stojka, Ruthenian Bishop of Mukaceve, and Most Rev. Sisto Sosa, Bishop of Cumana, Venezuela.

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On August 26, Very Rev. William H. O'Neil, J.C.D., Officialis of the Diocese of Seattle, died.

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Most Rev. Thomas Mulvany, Bishop of Meath, died on June 16, at the age of 75.

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100 years ago on August 15, Most Rev. Michael O'Connor was consecrated in Rome as the first Bishop of Pittsburgh.

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90 years ago, Archbishop Bedini arrived in the United States to visit the dioceses of the country as the representative of Pope Pius IX.

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75 years ago Pope Pius IX issued the Solemn Bull convoking a General Council of the hierarchy to be held in Rome December 8, 1869.

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75 years ago, in the Cathedral at Baltimore, His Eminence, James Cardinal Gibbons was consecrated Vicar Apostolic of North Carolina, and Most Rev. Thomas A. Becker, D.D., was consecrated first Bishop of Wilmington.

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75 years ago, on July 12, Rt. Rev. William O'Hara was consecrated Bishop of Scranton; Most Rev. Jeremiah F. Shanahan, Bishop of Harrisburg; and Most Rev. Bernard McQuaid, Bishop of Rochester. The former two were consecrated in the Cathedral at Philadelphia, the latter in the Cathedral in New York.

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75 years ago on August 2, Most Rev. Tobias Mullen was consecrated Bishop of Erie.

50 years ago, Most Rev. John Watterson, Bishop of Columbus, celebrated the twenty-fifth anniversary of his ordination.

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40 years ago Pope Leo XIII died, aged 93, in the 26th year of his pontificate, and the 66th year of his priesthood.

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40 years ago Most Rev. Charles Colton, D.D., was consecrated in the Cathedral at New York for the Diocese of Buffalo.

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25 years ago, His Eminence, Dennis Cardinal Dougherty, was installed as Archbishop of Philadelphia.

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25 years ago, His Eminence, James Cardinal Gibbons, celebrated the fiftieth anniversary of his consecration.

WAR ACTIVITIES

On the occasion of the recent death of Lin Sen, President of China, Pope Pius XII communicated an expression of sympathy to the Chungking Government.

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In mid-August, His Excellency, Most Rev. Amleto Giovanni Cicognani, Archbishop of Laodicea and Apostolic Delegate, visited the following war prisoner camps: Wheeler in Georgia; Crossville and Forrest in Tennessee; Wingarten and Clark in Missouri.

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Archbishop William Godfrey, Apostolic Delegate to Great Britain and Papal Charge d'Affaires to the Polish Government-in-Exile, presided at the Throne at the Pontifical Mass of Requiem celebrated for Gen. Wladyslaw Sikorski, Polish Premier who was killed in an airplane accident off Gibraltar on July 4. The Mass was celebrated by Bishop Joseph Gawlina, Chaplain Ordinary of the Polish Armed Forces. Prime Minister and Mrs. Churchill were present. Temporary burial took place in the Polish airmen's cemetery at Newark, Nottinghamshire. Most Rev. C. L. Nelligan, D.D., Military Ordinary of the Canadian Armed Forces, celebrated the Requiem Mass in Ottawa; and Most Rev. J. C. Chaumont, D.D., Auxiliary of Montreal, celebrated the Mass in Montreal. Rt. Rev. Domenico Enrici, secretary of the Apostolic Nuntiature, celebrated the Mass in Dublin, at which Premier Eamon de Valera assisted.

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At the end of July, Most Rev. Francis J. Spellman, D.D., Archbishop of New York, and Military Vicar, returned to the United States after more than 45,000 miles of travel visiting the United States military establishments abroad.

Members of the diplomatic corps attended a Solemn Mass celebrated in the Shrine of the Sacred Heart, Washington, D. C., on July 7, the occasion of the sixth anniversary of China's war with Japan. The Mass was celebrated by Most Rev. Paul Yu Pin, Vicar Apostolic of Nanking, for the repose of the souls of the Chinese and American soldiers who had died in the war. Rt. Rev. Msgr. G. Barry O'Toole, D.D., preached the sermon.

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On July 25, certificates of award were presented to churches and other religious groups whose clergymen are serving as chaplains in the United States Army. The ceremony took place in the South Post Chapel, at Fort Myer, Va., at which Most Rev. John F. Noll, D.D., Bishop of Fort Wayne, made the principal address. The first certificate was presented to St. Charles' Church, Peru, Indiana, the parish from which Brig. Gen. William R. Arnold, Chief of Chaplains, came when he entered the service.

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Mr. James J. Norris has been confirmed in his appointment as executive director of the National Catholic Community Service, member agency of the USO, succeeding Dr. Franklin Dunham, who resigned early in the year.

DIGNITIES

On July 1, Most Rev. Joseph A. Burke, D.D., was consecrated Titular Bishop of Vita and Auxiliary Bishop of Buffalo, in St. Joseph's Cathedral, Buffalo, by the Most Rev. Apostolic Delegate. The co-consecrators were Most Rev. Thomas J. Walsh, D.D., Archbishop of Newark, and Most Rev. Edmund F. Gibbons, D.D., Bishop of Albany. The sermon was preached by Most Rev. John A. Duffy, D.D., Bishop of Buffalo.

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On July 22, Most Rev. James A. McFadden, D.D., first Bishop of Youngstown, Ohio, was enthroned in St. Columba's Cathedral. Most Rev. John T. McNicholas, O.P., Archbishop of Cincinnati, presided and preached the sermon.

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On August 3, Most Rev. Bryan J. McEntegart, D.D., Bishop of Ogdensburg, was consecrated in St. Patrick's Cathedral, New York City, by His Excellency, the Most Rev. Apostolic Delegate. The co-consecrators were Most Rev. Edmund F. Gibbons, D.D., Bishop of Albany, and Most Rev. Stephen J. Donahue, D.D., Auxiliary of New York. Rt. Rev. Robert F. Keegan, Secretary to the Archbishop of New York for Charities, preached. Most Rev. Bishop McEntegart was installed in St. Mary's Cathedral, Ogdensburg, on August 10, with Most Rev. Walter A. Foery, D.D., Bishop of Syracuse, presiding.

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Most Rev. James P. Davis, D.D., formerly chancellor-secretary of the Diocese of Tucson, has been named Bishop of San Juan, Puerto Rico.

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Most Rev. Johannes Gunnarsson, was consecrated Titular Bishop of Holar and Vicar Apostolic of Iceland, in St. Patrick's Church, Washington, D. C., by

His Excellency, the Most Rev. Apostolic Delegate, on July 7. The co-consecrators were Most Rev. Peter L. Ireton, D.D., Apostolic Administrator of Richmond, and Most Rev. John M. McNamara, D.D., Auxiliary of Baltimore-Washington. The sermon was preached by Most Rev. John F. O'Hara, C.S.C., D.D., Military Delegate. It was at Holar that the last previous Icelandic Catholic Bishop, John Arason, lived.

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On June 29, Most Rev. Matthew A. Niedhammer, O.F.M.Cap., of New York, was consecrated Titular Bishop of Caloe and Vicar Apostolic of Bluefields, Nicaragua, by Most Rev. James E. Walsh, M.M., D.D., in St. Patrick's Cathedral.

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Most Rev. Giovanni Constantini, Titular Archbishop of Colossus, has been named by our Holy Father, President of the Central Pontifical Commission for Sacred Art.

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Rt. Rev. Msgr. Giuseppe Ferretto has been named Substitute Assessor of the Sacred Consistorial Congregation.

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Most Rev. John R. MacDonald, chancellor of Antigonish, has been named Bishop of Peterborough, Canada.

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On July 1, Most Rev. Nilus Nicholas Savaryn, O.S.B.M., D.D., was consecrated Auxiliary to Most Rev. Basil Vladimir Ladyka, O.S.B.M., D.D., Ordinary of the Ukrainian Greek Catholic Diocese in Canada.

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Most Rev. Jayme de Barros Camara, Archbishop of Belem do Para, has been named Archbishop of Rio de Janeiro, vacant since the death of Cardinal Leme da Silveira Cintra on October 17 last.

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Most Rev. Alfredo Cifuentes, Bishop of Antofagasta, Chile, has been named Archbishop of La Serena, Chile.

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Most Rev. Joseph Turcios, a Salesian, has been named Titular Bishop of Carnae and Auxiliary to Most Rev. Angel Navarro, Bishop of Santa Rosa de Copan, Honduras.

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Episcopal appointments in Spain: Most Rev. Enrique Gomez, Vicar General of Badajoz, Bishop of Almeria; Most Rev. Jesus Perez, Vicar General of Granada, Bishop of Astorga; Most Rev. Inocencio Diez, Bishop of Cuenca; Most Rev. Rafael Lara, Bishop of Guadix; Most Rev. Tomas Diaz, Bishop of Osma, becomes Bishop of Cadiz; Most Rev. Juan Sanz, Bishop of Jaca, becomes Bishop of Lerida; Most Rev. Francisco Torralba, Administrator of Vittoria, becomes Bishop of Palencia; and Most Rev. Carmelo Nieto, Bishop of Leon, becomes Bishop of Vittoria. In France: Most Rev. Joseph Lefebvre, Bishop of Troyes, has become Archbishop of Bourges; Most Rev. Stanislas

Courbe and Most Rev. Paul Louis Touze have been made Auxiliaries of Paris, the former Titular of Castoria and the latter Titular of Lebessus; Most Rev. Maurice Rousseau, Titular of Isba and Auxiliary to Most Rev. Georges Audollent, Bishop of Blois.

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Three new provinces have been established in Peru: Arequipa, Cuzco, and Trujillo.

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Most Rev. John B. Peterson, Bishop of Manchester, received the honorary degree of Doctor of Laws from the University of Ottawa.

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Most Rev. Paul Yu Pin, Vicar Apostolic of Nanking, received the honorary degree of Doctor of Laws from Loyola University, Chicago, on the occasion of its annual commencement exercises in June.

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On July 6, Rt. Rev. Cuthbert McDonald, O.S.B., D.D., was elected Coadjutor Abbot of St. Benedict's Abbey, Atchison, Kansas, succeeding Rt. Rev. Martin Veth, O.S.B., D.D., Abbot for the past twenty-two years.

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Rt. Rev. Msgr. George J. Casey, chancellor of the Archdiocese of Chicago, was named Vicar General on June 22, and Rev. Edward M. Burke, chancellor.

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Rt. Rev. Msgr. George N. Habig has been named Vicar General of the Diocese of Youngstown; and Rev. Alfred J. Neinrich, chancellor.

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Rev. Leo J. Ryan, pastor of Sacred Heart Cathedral, Richmond, has been named Vicar General of the Diocese. Rev. Robert O. Hickman has been named chancellor.

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Very Rev. Msgr. Vincent B. Balmat has been named chancellor of the Diocese of Cleveland, and Rev. John J. Krol, vice chancellor.

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Very Rev. John J. Lardner, S.S., D.D., rector of St. Mary's Seminary, Baltimore, has been elected acting provincial of the Society of St. Sulpice in the United States.

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The following recently appointed monsignori of the Wheeling Diocese will be invested on October 5 by Most Rev. John J. Swint, D.D., Bishop of Wheeling, in St. Joseph's Cathedral: Rt. Rev. William Lee, Vicar General; Rt. Rev. Daniel Murphy; Rt. Rev. Martin Egan; and Rt. Rev. Edmund J. Yahn, rector of the Cathedral.

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The following priests have been named Domestic Prelates: Archdiocese of St. Louis: Rt. Rev. Msgrs. Mark K. Carroll, Leo J. Steck, Thomas J. Lloyd, John T. Sesnon, John J. Butler, and Thomas D. Kennedy. Diocese of Lincoln: Rt. Rev. Msgrs. Ferdinand G. Mock, Francis A. O'Brien, Michael C. Grogan,

Herman S. Haukap, Clement F. Broerman, and the late Charles A. Becker, who died after recommendation for his elevation had been sent to Rome. Diocese of Owensboro: Rt. Rev. Msgr. Louis Beruatto, S.T.D. Diocese of Wichita: Rt. Rev. Msgr. William Schaefers, on the occasion of the silver jubilee of his ordination to the priesthood. Diocese of Fort Wayne: Rt. Rev. Msgrs. John G. Bennett and J. S. Ryder. Diocese of Concordia: Rt. Rev. Msgrs. Richard Daly, Vicar General, James McErlean, J. B. Glynn, Samuel V. Fraser, August P. Koerperich, and Thomas Keogan.

The following priests have been named Papal Chamberlains: Archdiocese of St. Louis: Very Rev. Msgrs. Patrick D. Gavan, Anthony T. Strauss, Henry F. Scheuermann, S.T.D., and Alfred G. Thompson. Diocese of Lincoln: Very Rev. Thomas A. Kealy, J.C.D., chancellor. Diocese of Fort Wayne: Very Rev. Msgrs. John Sabo and Henry A. Hoerstman.

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Very Rev. Patrick A. O'Boyle, director of the Mission of the Immaculate Virgin at Mt. Loretta, Staten Island, has been named Executive Director of the War Relief Services of the National Catholic Welfare Conference, succeeding Most Rev. Bryan J. McEntegart, D.D., Bishop of Ogdensburg.

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Rev. Thomas J. McMahon has been appointed national secretary of the Catholic Near East Welfare Association by the Sacred Congregation for the Oriental Church, succeeding Most Rev. Bryan J. McEntegart, D.D., Bishop of Ogdensburg.

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Rev. Bernard L. Flanagan, J.C.D., has been appointed chancellor of the Diocese of Burlington.

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Rev. Philip Gordon, a Chippewa Indian, said the prayer opening the session of the House of Representatives of the United States on June 11.

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Gen. Higino Morinigo, President of Paraguay, received the honorary degree of Doctor of Laws from Fordham University on June 19. In Washington, he assisted at Mass at St. Matthew's Cathedral.

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Martin J. Callaghan, of Macon, Georgia, received the Papal medal "Pro Ecclesia et Pontifice".

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